

91-810

Supreme Court, U.S.  
FILED

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No. \_\_\_\_\_

In The  
**Supreme Court of the United States**  
October Term, 1991

— ♦ —  
CITY OF BURLINGTON,

*Petitioner,*

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,  
BETTY DAGUE, AND ROSE A. BESSETTE,

*Respondents.*

— ♦ —  
**Petition For Writ Of Certiorari To The  
United States Court Of Appeals  
For The Second Circuit**

— ♦ —  
**APPENDIX TO PETITION FOR WRIT OF CERTIORARI  
VOLUME II, PAGES 118-279**

— ♦ —  
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**Ernest DAGUE, Sr., Ernest Dague, Jr.,  
and Betty Dague, Plaintiffs**

**v.**

**CITY OF BURLINGTON, Defendant.**

**Civ. No. 85-269.**

United States District Court,  
D. Vermont.

March 15, 1990.

**OPINION AND ORDER**

**BILLINGS, Chief Judge.**

On December 11, 1989 defendant moved, pursuant to Fed. R. Civ. P. 12 and 56 for dismissal and/or summary judgment as to Counts II, III and, in part, Count IV. Trial by court on defendant's liability as to these counts was held in May 1989 and with the exception of Count I this court found substantially for the plaintiffs. *See Dague v. City of Burlington*, 732 F. Supp. 458 (D.Vt.1989). Nonetheless, defendant bases this late-hour motion solely on the Supreme Court's recent decision in *Hallstrom v. Tillamook County*, \_\_\_U.S. \_\_\_, 110 S.Ct. 304, 107 L.Ed. 2d 237 (1989). For the forthcoming reasons, the court concludes that *Hallstrom* does not mandate dismissal of these counts; therefore, the defendant's motion is DENIED.

## I. BACKGROUND

On October 8, 1985 plaintiffs sent letters by first-class mail to the Environmental Protection Agency (EPA), the State of Vermont, and the defendant City of Burlington alleging that the defendant was operating its landfill in violation of the Resource Conservation and Recovery Act (RCRA) 42 U.S.C.A. §§ 6901-6992k (1983 & Supp. 1989) and the Clean Water Act (CWA), 33 U.S.C.A. §§ 1251-1387 (1986 & Supp. 1989). In particular, plaintiffs alleged in the letters that the defendant was violating 42 U.S.C. §§ 6925, 6930, and 6945 of RCRA and 33 U.S.C. §§ 1311, 1317, and 1342 of the CWA. The next day plaintiffs filed suit in this court.<sup>1</sup>

Count I of plaintiffs' complaint accuses the defendant of violating the notice and permit requirements for hazardous waste disposal contained in 42 U.S.C. §§ 6925(a) and 6930(a) and their corresponding regulations. Count II charges defendant with violating the open dumping prohibitions of 42 U.S.C. § 6945 and the regulations promulgated thereunder. Count III claims, pursuant to 42 U.S.C. § 6972(a)(1)(B), that defendant is disposing of solid or hazardous wastes in a manner in which "may present an imminent and substantial endangerment to health or the environment." Count IV contends that defendant is violating 33 U.S.C. §§ 1311, 1317, and 1342 by discharging toxic and other pollutants into a navigable waterway without a permit. Counts V through IX allege various

<sup>1</sup> Defendant does not argue that the letters reached the appropriate parties after the commencement of the civil action. See 40 C.F.R. § 254.2(c) (1989) (notice is considered served on date of receipt).

Vermont common law and statutory violations which are not at issue in the motion now before the court.

In May 1989, trial by court was held on defendants liability under Counts I through V; the court subsequently issued its Findings of Fact, Opinion, and Order. See 732 F. Supp. 458 (D.Vt.1989). In short, this court found that the plaintiffs had failed to prove the allegations of Count I but had sufficiently established liability under Counts II, III, IV, and V. Indeed, the court concluded that the plaintiffs had substantially prevailed on both the RCRA and the CWA claims and thus the defendants were ordered to pay the costs of litigation pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

Moments prior to the court's hearing on reasonable attorneys' fees, however, the defendant, relying on the recent decision of *Hallstrom v. Tillamook County*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), filed this motion requesting the court to dismiss Counts II, III, and in part, IV. In *Hallstrom*, the Court emphatically refused to depart from the literal meaning of the notice requirements of the citizen suit provisions of RCRA. Section 6972(b)(1)(A) prohibits actions brought under that section "prior to sixty days after the plaintiff has given notice of the violation" to the Environmental Protection Agency (EPA), the State in which the alleged violation occurs, and the alleged violator. In light of this clear statutory language and plaintiffs' failure to give any notice, the Court dismissed the complaint despite the fact that the case has gone to trial and the district court had held that the defendant had violated RCRA. *Id.* 110 S.Ct. at 311.

The Court in *Hallstrom* buttressed its holding by noting that where Congress had determined that 60 days prior notice was unimportant, it had created exceptions. 110 S.Ct. at 309. The Court referred to 42 U.S.C. § 6972(b)(1)(A)(iii) which abrogates the 60-day notice provision for civil actions "respecting a violation of subchapter III." Subchapter III contains the RCRA provisions which address the identification, transportation, storage, and disposal of hazardous wastes. Because violations of subchapter III were not involved in *Hallstrom*, however, the Court did not confront the issue now facing this court of whether citizen plaintiffs must still provide 60 days notice as to non-subchapter III claims when they have properly filed a civil action which alleges a subchapter III violation involving the same facility. Nor did the Court in *Hallstrom* address the remaining issue presented here of whether failure to specifically allege and "endangerment," in a letter which purported to notify the defendant of various RCRA violations, is necessarily fatal to an "imminent and substantial endangerment" claim involving subchapter III.

## II. DISCUSSION

Defendant contends that Count II must be dismissed because that claim was not brought under subchapter III and thus is not subject to the relaxed notice provisions. In essence, the defendant requests this court to hold that when a citizen suit involves both hazardous waste (subchapter III) and other RCRA claims arising from one facility, only the hazardous waste claims may be brought without providing sixty days notice pursuant to § 6972(b)(1)(A). Under such a holding a citizen must

choose between delaying 60 days before bringing the hazardous waste claim and thus bring all the claims simultaneously or filing the hazardous waste claim immediately after notice is given and then seek leave to amend the complaint to add the remaining claims after 60 days have passed. The court does not believe Congress intended either outcome.

Section 6972(b)(1)(A)(iii) excuses the 60-day notice requirement in "the case of an action under this section respecting a violation of subchapter III." Where both subchapter III and non-subchapter III violations are involved, however, the application of this provision is equivocal. It is not clear whether only the subchapter III claims may be brought without the 60-day notice or whether the non-subchapter III claims can also be brought as long as the civil action involves at least one subchapter III claim. Given this ambiguity it is appropriate to interpret the provision in a manner most compatible with the statute as a whole. See *Commissioner of Internal Revenue v. Asphalt Products Co.*, 482 U.S. 117, 121, 107 S.Ct. 2275, 2277-78, 96 L.Ed.2d 97 (1987); *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398, 408-09 (D.C.Cir.1976).

The interpretation most harmonious with the statute is that when a civil action involves or includes a subchapter III claim the 60-day notice provision is inapplicable. This broad reading of an "action . . . respecting a violation of subchapter III" comports with Congress' two justifications for the 60-day notice requirement. First, the 60-day notice provision allows government agencies to take the lead role in enforcing environmental regulations. *Hallstrom*, 110 S.Ct. at 310. Second, the notice provision preserves a non-adversarial climate in which the alleged

violator is given an opportunity to comply with the Act. *Id.* Neither of these justifications would be furthered by selectively dismissing those counts of this civil action which do not involve subchapter III.

As to the first concern, Congress has determined that when hazardous wastes are involved the interest of encouraging a lead governmental enforcement role is substantially diminished. See 42 U.S.C. §§ 6972(b)(1)(A)(iii) and (b)(2)(A)(iii). It thus follows there is no need to maintain a window of opportunity for the government to take the lead enforcement role as to non-subchapter III claims when a citizen, acting as a private attorney general, has already lawfully assumed the lead role in bringing a subchapter III claim against the same facility. For that matter it appears unlikely that a governmental agency would pursue a non-subchapter III action when it has ignored the more compelling concerns of a potential hazardous waste violation involving the same facility.

Secondly, the filing of a citizen suit involving subchapter III immediately after notice is given effectively eliminates the opportunity for non-adversial compliance with non-subchapter III regulations. It can hardly be maintained that the adversial climate surrounding a civil action involving a subchapter III violation would behave like an isolated storm cloud and linger over only the filed subchapter III claim while allowing the sun to shine brightly on all other contacts between the alleged violator, the citizen, and the government agencies. In short, requiring a citizen who alleges both subchapter III and non-subchapter III violations of RCRA to bring piecemeal litigation will not at all serve the functions of the notice provisions.

In addition, interpreting "respecting a violation of subchapter III" as involving or including a violation of subchapter III comports with the Supreme Court's characterization of § 6972(b)(1)(A) as "abrogating the 60-day requirement when there is a danger that hazardous waste will be discharged." *Hallstrom*, 110 S.Ct. at 309. Moreover, the Court observed in *Hallstrom* that the citizen suit provisions for other environmental statutes authorize the filing of citizen suits "immediately in cases involving violations" of certain emission or effluent standards. *Id.* at 311 (emphasis added) (describing notice provisions of Clean Air Amendments of 1970, 42 U.S.C. § 7604(b) and Federal Water Pollution Control Act, 33 U.S.C. §§ 1365(b), 1317(a)). The notice provisions the Court was referring to in these statutes contain the same operative words as the notice provision at issue here, to wit: an "action respecting" a violation; therefore, the Court's characterization is equally applicable in this case. Defendant's motion to dismiss Count II must thus be rejected.

Defendant also argues that the content of the letter failed to provide adequate notice of the alleged violations of Count III.<sup>2</sup> Count III alleges, pursuant to 42 U.S.C.

<sup>2</sup> The magistrate has previously held that plaintiffs provided proper notice prior to the filing of this civil action as required by § 6972(b)(2)(A)(iii). See Magistrates Report and Recommendation at 33, *Dague v. City of Burlington*, No. 85-269 (D. Vt. February 21, 1986), *adopted in toto*, Opinion and Order, (D. Vt. March 26, 1986). At that time the magistrate rejected defendant's argument that plaintiffs' civil action was subject to the 90-day notice provision. The defendant did not argue before the magistrate that the content of the letter failed to comply with the notice requirements of § 6972(b)(2)(A)(iii).

§ 6972(a)(1)(B), that the solid and hazardous waste disposal methods at the Burlington landfill "may present an imminent and substantial endangerment to health or the environment." A citizen suit cannot be brought pursuant to § 6972(a)(1)(B) unless the plaintiff first provides 90 days "notice of the endangerment" to the EPA, the State where the alleged violation occurs, and the alleged violator. § 6972(b)(2)(A). When the action is brought "respecting a violation of subchapter III," however, the 90-day notice provision is inapplicable and the plaintiff need only give prior "notice of the endangerment" to the appropriate parties. § 6972(b)(2)(A)(iii). Defendant concedes that Count III involves a subchapter III violation but argues that plaintiff did not provide specific "notice of the endangerment" as required by § 6972(b)(2)(A).

Indeed, the letter plaintiffs provided to the EPA, the State of Vermont, and the City of Burlington was not a paradigm of thoroughness. The letter fails to expressly allege either a violation of 42 U.S.C. § 6972(a)(1)(B) or that an "endangerment" existed. On the other hand the letter did state that the City of Burlington was operating its landfill in violation of RCRA and the CWA. In addition, plaintiff's letter cited to specific sections of subchapter III; thus, the defendant had notice that plaintiffs' allegations pertained to the disposal of hazardous wastes.

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(Continued from previous page)

Thereafter the defendant did not specifically object to the magistrates determination that notice was proper and this court adopted the magistrate's report *in toto*. Four years subsequent to the filing of the complaint defendant now contends for the first time that the content of the letter was insufficient.

Nevertheless, because the letter did not specifically allege an "endangerment" nor cite to § 6972(a)(1)(B) it technically did not comport with the notice requirement of § 6972(b)(2)(A)(iii) which demands "notice of the endangerment." See also 40 C.F.R. § 254.3(a) (1989) (notice should be sufficient to permit identification of the specific permit, standard, regulation, condition requirement, or order alleged to be violated). This defect was not cured by the fact that the plaintiffs, after filing the complaint, provided a copy to the defendant, the EPA, and the State of Vermont because the statute's clear language forbids a complaint to be filed until "after" notification of the "endangerment" is given. § 6972(b)(2)(A)(iii).

To the extent that the content of plaintiffs' letter failed to provide adequate notice of the "endangerment," however, *Hallstrom* does not mandate dismissal. The notice provision at issue in *Hallstrom* did not concern the exception to the 60 and 90-day notice provisions for citizen suits which involve a subchapter III claim. Congress created this exception because it determined that the need to respond immediately to RCRA violations involving hazardous wastes outweighed the interests of promoting initial agency action and voluntary, non-adversarial compliance by the alleged violator. *Hallstrom*, 110 S.Ct. at 309-10. Congress thus authorized citizens to bring a civil action involving subchapter III "immediately" after giving notice of the "endangerment." 42 U.S.C. § 6972(b)(2)(A)(iii). Technically plaintiffs may provide this notice only one minute before they file their complaint and indeed in this case plaintiffs sent notice the day before they filed their complaint. Thus, as a

practical matter, notice in a subchapter III case accomplishes little else than notifying the appropriate governmental agencies and the alleged violator that the filing of a complaint by citizens is imminent. See *United States v. Environmental Waste Control, Inc.*, 710 F.Supp. 1172, 1190 (N.D.Ind.1989).

In contrast, in a non-subchapter III case – like that before the *Hallstrom* Court – specific notice is required to give the appropriate governmental agencies an opportunity to act and the alleged violator an opportunity to comply. *Hallstrom* is further distinguished by the fact that it involved the lack of notice altogether, while defendant here attacks the sufficiency of the letter which admittedly was provided. See *Hallstrom*, 110 S.Ct. at 307.

In light of the nominal value of prior notice in citizen suits involving hazardous wastes the court declines to dismiss Count III – four years after the complaint was filed and two months subsequent to the court's determination that defendant is liable – merely because plaintiff failed to specifically allege an "endangerment."<sup>3</sup> To hold otherwise would allow form to reign over substance and would thwart Congress' purpose of providing an exception to the strict notice requirements in instances

<sup>3</sup> There is also support for denying defendant's motion to dismiss Count III on the grounds that it was not timely raised. See *Environmental Waste Control*, 710 F.Supp. at 1190 (objections to inadequate notice of hazardous waste claims waived if not timely raised). *Hallstrom* does not necessarily preclude a timeliness bar to alleging improper notice of subchapter III claims because it did not concern subchapter III nor did it involve objections to the content of a letter of notice.

involving the heightened danger and immediacy of hazardous wastes. See *Lamke v. Lynn*, 680 S.W.2d 285 (Mo.Ct.App.1984) (The meaning given by courts to a statutory notice requirement depends largely on the context, purpose, and intent of the statute.); 58 Am.Jur.2d Notice § 2 at 572 (1989). In other words, under the circumstances presented here, literal application of the prior "notice of the endangerment" requirement would produce a result " 'demonstrably at odds with the intentions of its drafters.' " *Hallstrom*, 110 S.Ct. at 310 (quoting *United States v. Ron Pair Enterprises, Inc.*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989)). Accordingly, defendant's motion to dismiss Count III must be rejected.

Defendant also argues that to the extent that Count IV alleges violations which are subject to the Clean Water Act's 60-day notice provision it must also be dismissed. Defendant concedes that Count IV's alleged violations of 33 U.S.C. § 1317 were properly brought without 60 days notice. Because the operative words of the notice provisions for the Clean Water Act are identical to those in RCRA the defendant proffers essentially the same argument for dismissing parts of Count IV as it did for dismissing Count II. Compare 33 U.S.C. § 1365(b)(2) ("an action . . . respecting a violation of . . . section [ ] . . . 1317") with 42 U.S.C. § 6972(b)(1)(A)(iii) ("an action . . . respecting a violation of subchapter III"). The court, in turn, rejects this argument on the same grounds as the court rejected defendant's argument concerning Count II. Defendant's motion to dismiss is thus DENIED.

Lastly, defendant requests the court, pursuant to Fed. R.Civ.P. 58, to enter a judgment with respect to those claims in which the court found for the defendant in its

Opinion and Order of October 16, 1989. This motion, however, is MOOTED by the court's denial of defendant's motion to dismiss the remaining counts.

SO ORDERED.

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

|                             |   |           |
|-----------------------------|---|-----------|
| ERNEST DAGUE, SR., ERNEST   | : |           |
| DAGUE, JR., and BETTY DAGUE | : | Civil No. |
|                             | : | 85-269    |
| v.                          | : |           |
| CITY OF BURLINGTON          | : |           |

OPINION AND ORDER

Plaintiffs move for an award of attorneys fees, costs, enhancement of fees, and a delay enhancement of fees. As previously found in our prior orders, plaintiff has substantially prevailed in this cause, and is entitled to an award of attorneys fees pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d). *See Hanrahan v. Hampton*, 446 U.S. 754 (1980). There is no need to revisit this issue. Upon consideration of the time records, receipts, affidavits, and memoranda, the court finds that the lodestar amount for hourly rates is reasonable, and the court notes that the defendant does not object to these rates. The court also finds that the number of hours expended, as well as the expert and miscellaneous expenses incurred, is reasonable in connection with this complex litigation. The plaintiff is hereby awarded attorneys fees in the amount of \$198,027.50, and expenses, including expert fees, in the total amount of \$10,929.66.

Plaintiffs, relying on *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987) (plurality) (*Delaware II*) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984), also seek a 100% enhancement of total attorneys fees. Plaintiffs initially

claim that several factors justify an enhancement: the novelty of the issues; the difficulty in prosecuting the case, the skill and experience of attorneys, and the preclusion of employment by the attorneys. The law, however, does not support plaintiffs' use of these factors to bolster its enhancement request. In *Krieger v. Gold Bond Building Products*, 863 F.2d 1091 (2d Cir. 1988), the court expressly held that, absent rare and exceptional circumstances, enhancement may no longer be justified on the basis of factors such as the novelty of the issues and the complexity of the litigation because these factors are assumed to be reflected in the hourly rate and number of hours charged by the attorneys; thus, they are subsumed in the calculation of the lodestar amount. *Id.* at 1099 (citing *Blum v. Stenson*, 465 U.S. 866, 883-900 (1984)); see also *Cooper v. State of Utah*, 894 F.2d 1169, 1171 (10th Cir. 1990).

Similarly, the court believes the skill and experience of the attorneys is also accounted for in the hourly rate and number of hours contained in the lodestar amount. As to preclusion of employment the court believes this factor is implicitly taken into account in determining whether enhancement is justified on a contingency/risk basis. Plaintiffs have failed to make a showing that rare and exceptional circumstances exist; therefore, the court declines to enhance the lodestar amount based upon the above factors.

Plaintiffs also claim that enhancement is warranted under the contingency/risk factor. The Second Circuit's post-*Delaware II* standard for determining enhancement pursuant to the contingency/risk factor was enunciated in *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987). There the court held that: "the rationale

that should guide the court's discretion is whether '[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts.' " *Id.* at 298 (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)). In applying this standard the court denied enhancement because it found that the plaintiffs were subject to only a slight risk of not prevailing on the merits.<sup>1</sup> 834 F.2d at 298.

Under the fee arrangements here, plaintiffs' attorneys would not have been compensated at all unless plaintiffs prevailed. Unlike *Friends of Earth* the risk of not prevailing was substantial under the facts here. This risk was

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<sup>1</sup> The court recognizes that other circuits have held that Justice O'Connor's test for contingency/risk enhancement, outlined in her *Delaware II* concurrence, is controlling. See, e.g., *Alberti v. Klevenhagen*, 1990 Westlaw 19646 (5th Cir. 1990); *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990); *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989). In essence, Justice O'Connor's test requires a fee applicant to establish: (1) that the relevant market compensates for contingency; and (2) that without the possibility for an adjustment for contingency or risk the prevailing party would have had substantial difficulty in finding counsel in the local market. 483 U.S. at 733-34. Defendant here claims that plaintiffs have failed to make a finding that the relevant market compensates for risk. Such a finding, however, is presently not required in this circuit. While the court in *Friends of Earth* conceded that Justice O'Connor's test was "similar" to the Second Circuit test, it continued to follow its prior holding in *Coughlin* which focuses on the risk to plaintiff's counsel and whether absent fee enhancement competent counsel might refuse to accept the case. 834 F.2d at 298 (citing *Coughlin*, 801 F.2d at 576). Until this court is directed otherwise, we will continue to apply the test for enhancement as espoused in *Friends of Earth* and *Krieger*.

evidenced in part by the court's denial of plaintiffs' motion for a preliminary injunction. Moreover, because numerous material facts were disputed plaintiffs did not ultimately prevail until after trial. Finally, from the memoranda and affidavits on file, the court finds that absent an opportunity for enhancement, plaintiff would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law. Compare *Wilder v. Bernstein*, 725 F.Supp. 1324, 1338 (S.D.N.Y. 1989) (inadequate showing that absent enhancement competent counsel could not be retained). In light of these findings, the court concludes that a 25% enhancement is appropriate, but anything more would be a windfall to the attorneys. 483 U.S. at 731 n.12 (" 'Attorney's fees award should only be as large as necessary to attract competent counsel.' ") (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2nd Cir. 1986)).

Plaintiffs also request a delay enhancement but enhancement based on delay in payment is an exception to the rule that historic rates generally prevail. *New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1152 (2d Cir. 1983). To the extent that this case was overly protracted, the court believes the 25% enhancement previously granted for contingency/risk adequately compensates plaintiffs' counsel for the delay in receiving payment. Accordingly, the court declines to entertain a separate delay enhancement.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff shall recover from the defendant the sum of \$198,027.50 for attorneys fees, plus necessary expenses in the amount of \$10,929.66, together with a

25% enhancement of the total attorneys fees in the amount of \$49,506.87 plus taxable costs.

SO ORDERED.

Dated at Rutland in the District of Vermont this 2nd day of April, 1990

/s/ Franklin S. Billings, Jr.  
Franklin S. Billings, Jr.  
Chief Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

|                             |   |           |
|-----------------------------|---|-----------|
| ERNEST DAGUE, SR., ERNEST   | : |           |
| DAGUE, JR., and BETTY DAGUE | : |           |
|                             | : | Civil No. |
| v.                          | : | 85-269    |
| CITY OF BURLINGTON          | : |           |

ORDER

On April 17, 1990, plaintiffs petitioned the court to enforce its previous order of April 2, 1990 which ordered the defendant to pay attorneys fees and necessary expenses. Defendant City of Burlington responded by moving for an entry of judgment of the April 2, 1990 order as well as the court's order of October 16, 1989.

In consideration of this matter, the court finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for a delay in entering judgment on these orders. Specifically, the court finds that with the exception of Count V addressed in the October 16, 1989 order, the claims decided by the two orders are independent from the state claims which remain; thus, there is no fair reason to delay certification for appellate review.

The court finds, however, that the October 16, 1989 order did not finally adjudicate damages as to Count V; therefore it is inappropriate to enter judgment as to that count. See *International Controls Corp. v. Vesco*, 535 F.2d 742, 748 (1976) ("[A] judgment cannot be considered final

as long as it leaves open the question of additional damages."); *Hudson v. Chicago Teachers Union Local No. 1*, 708 F. Supp. 961, 962 (N.D. Ill. 1989).

The defendant's motion for an entry of judgment is GRANTED IN PART. The plaintiff's petition for enforcement is DENIED pending appeal. The court directs the clerk of court to enter judgment as to Counts I, II, III and IV of the court's Opinion and Order, dated October 16, 1989, and the Opinion and Order dated April 2, 1990.

SO ORDERED.

Dated at Rutland in the District of Vermont this 4th day of May, 1990.

/s/ Franklin S. Billings, Jr.  
Franklin S. Billings, Jr.  
Chief Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST :  
DAGUE, JR., BETTY DAGUE, and :  
ROSE A. BESSETTE :

v. :

CITY OF BURLINGTON :

Civil No. 85-260

ORDER

On June 25, 1991, plaintiffs submitted a supplemental application for attorney's fees and expenses incurred since October 31, 1989, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d). Plaintiff also requests a 25% enhancement of the attorney's fees award pursuant to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). This court once again finds that plaintiff has substantially prevailed in this cause, and is entitled to an award of attorney's fees and expenses.

Upon consideration of the time records, receipts, affidavits, and memoranda, the court finds that the lodestar amount for hourly rates is reasonable, and the court notes that defendant does not object to these rates. The court further finds that the number of hours expended, as well as the miscellaneous expenses incurred, is reasonable. In accordance with our previous findings regarding enhancement of attorney's fees in this case, the court also finds that a 25% enhancement of attorney's fees is appropriate.

It is hereby ORDERED that plaintiff shall recover from defendant supplemental attorney's fees in the amount of \$24,113.00, and supplemental expenses in the

amount of \$2,707.61, together with a 25% enhancement of the attorney's fees, or \$6,028.25.

SO ORDERED.

Dated at Rutland in the District of Vermont this 11 day of October, 1991.

/s/ Franklin S. Billings, Jr.  
Franklin S. Billings, Jr.  
Chief Judge

DATE NR. 85-269 DAGUE v. CITY OF BURLINGTON PROCEEDINGS 1008 aus

|       |    |   |
|-------|----|---|
| 1985  |    |   |
| Oct 9 | 1  | COMPLAINT.  |
| ' '   | 2  | REQUEST FOR JURY TRIAL by pltfs.  |
| ' '   | 3  | MOTION for Preliminary Injunction by pltfs.   |
| ' '   | 4  | MEMORANDUM in Support of P#3.   |
| ' '   |    | ISSUED SUMMONS as to Deft 10-10-85.   |
| ' '   | 5  | ORDER OF REFERRAL-AWC-This case is referred to Magistrate Niedermeir for the following purposes: To hear and report on any motion authorized by 28 U.S.C. § 636(b)(1)(B) including pltf's motion for preliminary injunction; order dates for the completion of discovery; to determine any pretrial matter authorized by 28 USC § 636(b)(1)(A); to hold settlement and pretrial conference. Cy to attys. jj |
| ' 17  | 6  | SUMMONS RETURNED SERVED (Acceptance of Service by Atty McNeil). rer   |
| ' 21  | 7  | NOTICE OF APPEARANCE of McNeil, Murray & Sorrell, Inc. on behalf of deft.   |
| ' '   | 8  | MOTION to Continue Preliminary Injunction hearing and MEMO by deft.   |
| ' '   | 9  | DISCOVERY CERTIFICATE by deft. jj   |
| ' 24  | 10 | MEMORANDUM in Opposition to defts' motion to continue by pltfs (re:P#8  |

|        |    |  |
|--------|----|--|
| ' '    | 11 | MOTION to Add Additional pltf and to file Amended Complaint and MEMO by pltfs.   |
| ' '    | 12 | AFFIDAVIT of Michael Case in support of P#3.   |
| ' '    | 13 | AFFIDAVIT of Michael Case in support of P#3.   |
| ' '    | 14 | AFFIDAVIT of Pltfs in support of P#3 (File #2 started).  |
| ' '    | 15 | AFFIDAVIT of Donald Bessette in support of P#3   |
| ' '    | 16 | AFFIDAVIT of Clarke Hermance in support of P#3   |
| ' '    | 17 | AFFIDAVIT of B.D. Roebuck in support of P#3  |
| ' '    | 18 | AFFIDAVIT of Chris Fastie in support of P#3 jj   |
| Oct 28 | 19 | MOTION to Dismiss and MEMO by Deft City. gww   |
| ' '    | 20 | AFFIDAVIT of Frank Reed.   |
| ' '    | 21 | CERTIFICATES OF SERVICE. gww   |
| ' '    |    | In Chambers of Magistrate Niedermeier, William W. Pearson and Richard Bland. Esqs for pltfs., Joseph E. McNeil and Nancy Sheahan, Esqs. for Deft a conference was held.    |
| ' '    |    | In Court (Tape) Statements by Counsel re Motion to Amend. ORDERED: Motion to Amend Complaint and add a Party Pltf is granted.  |
| ' '    |    | Hearing on Deft's Motion to Dismiss. Statements by Counsel. ORDERED: Pltfs to file proper notice under the Act, Decision Reserved until after filing of the proper Notice. |

Hearing on Deft's Motion to Continue.  
Statements by Counsel

ORDERED: Decision Reserved. Pltfs to respond to Deft's discovery requests within 2 weeks, Deft to respond to Pltfs' discovery requests within 2 weeks after service. Deft to answer Complaint within 7 days.

Hearing on Pltfs' Motion for a Preliminary Injunction. James R. Ogden, Christopher L. Fasti, Craig D. Hindle, and Ernest Dague, Sworn by the Clerk and examined for the Pltf by Mr. Pearson, Crossexamined by Mr. McNeil.

ORDERED: Motion to continue hearing by Deft is granted. Hearing is continued until Dec 9.

IN Chambers a conference was held.  
gww

Nov 5 22 APPEARANCE of McNeil, Murray & Sorrell, Inc., for Deft and ANSWER, rer  
' 7 23 NOTICES to take Deposition of General Electric Co., The Blodgett Co., Inc., E.B. & A.C. Whiting Co., The Edlund Co., Inc., and Hagar Hardware Co. ISSUED Deposition Subpoenas to parties in P#23.  
' 24 AFFIDAVIT of William W. Pearson, Esq. (P#23). lf

\* \* \*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 20th day of August, one thousand nine hundred and eighty-six.

PRESENT:

HONORABLE GEORGE C. PRATT,  
HONORABLE ROGER J. MINER,  
Circuit Judges,

HONORABLE EDWARD D. RE,  
Chief Judge of the United States  
Court of International Trade,  
sitting by designation.

-----x  
ERNEST DAGUE, SR., ERNEST DAGUE,  
JR., BETTY DAGUE AND ROSE A.  
BESSETTE,

Plaintiffs-Appellants,

-against-

No. 86-7326

CITY OF BURLINGTON,  
Defendant-Appellee,

-against-

(Filed  
Aug. 20, 1986)

GENERAL ELECTRIC COMPANY, INC.,  
BLODGETT COMPANY, INC., EDLUND  
COMPANY, INC., E.B. & A.C. WHITING  
COMPANY, AND HAGAR HARDWARE  
COMPANY,

Third-Party Defendants.

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This appeal from an order of the United States District Court for the District of Vermont, Franklin S. Billings Jr., *Judge*, came on to be heard on the transcript of the record from the United States District Court for the District of Vermont and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered that the order of the district court is affirmed.

Appellants, owners of land adjoining the City of Burlington's Municipal Disposal Grounds, appeal from an order denying their motion to preliminarily enjoin the City's operation of that landfill. Appellants sued under the citizen-suit provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972, and the Clean Water Act (CWA), 33 U.S.C. § 1365, as well as under various common law theories of liability, alleging that the operation of the landfill had generally harmed the environment.

Although he found sufficient evidence at the preliminary stage of the proceedings to decide that the City had violated RCRA and CWA, Judge Billings reasoned that an injunction against the operation of the landfill should not then issue because little, if anything, beneficial to the environment would be achieved. Rather, he ordered the City to have a gas ventilating and leachate collection system fully operational within sixty days and indicated that any further relief would have to await a full trial on the merits.

The decision whether to grant or refuse a preliminary injunction lies in the sound discretion of the district judge, whose decision will not be disturbed on appeal

absent an abuse of discretion. *See Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 314-15 (2d Cir. 1982). Here, Judge Billings carefully limited the application of his rulings to the proceedings for a preliminary injunction, and we note that the trial on the merits is imminent. For these reasons, we find no abuse of discretion on this record in refusing to grant the injunction requested by appellants and, therefore, the order of the district court is affirmed.

|  |   |
|--|---|
| N.B. Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court. | /s/ <u>George C. Pratt</u><br>George C. Pratt, U.S.C.J. |
|  | /s/ <u>Roger J. Miner</u><br>Roger J. Miner, U.S.C.J.   |
|  | /s/ <u>Edward D. Re</u><br>Edward D. Re, U.S.C.I.T.     |

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UNITED STATES COURT OF APPEALS

FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of August, one thousand nine hundred and ninety-one.

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ERNEST DAGUE, SR., ERNEST  
DAGUE, JR., BETTY DAGUE,  
ROSE A. BESSETTE,

Plaintiffs-Appellees,

V.

CITY OF BURLINGTON,  
Defendant-Appellant.

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DOCKET  
NUMBER  
90-7544

(Filed  
Aug. 20, 1991)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellant CITY OF BURLINGTON

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith  
ELAINE B. GOLDSMITH  
Clerk

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Constitution of the United States, Article I, Section 1.

### ARTICLE I

**Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Constitution of the United States, Article III, Section 1.

### ARTICLE III

**Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Constitution of the United States, Article III, Section 2.

### ARTICLE III

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; –

between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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Section 301, as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. § 1311.

**§ 1311. Effluent limitations**

**(a) Illegality of pollutant discharge except in compliance with law**

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

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Section 307 as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. § 1317.

**§ 1317. Toxic and pretreatment effluent standards**

**(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation**

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the

applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition,

the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be

included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees. States, independent experts, and Federal departments and agencies.

**(b) Pretreatment standards; hearing; promulgation; compliance period; revision; application to State and local laws**

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such

treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three year from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

**(c) New sources of pollutants into publicly owned treatment works**

In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

**(d) Operation in violation of standards unlawful**

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under

this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

**(e) Compliance date extension for innovative pretreatment systems**

In the case of any existing facility that proposes to comply with the pretreatment standards of subsection (b) of this section by applying an innovative system that meets the requirements of section 1311(k) of this title, the owner or operator of the publicly owned treatment works receiving the treated effluent from such facility may extend the date for compliance with the applicable pretreatment standard established under this section for a period not to exceed 2 years -

(1) If the Administrator determines that the innovative system has the potential for industrywide application, and

(2) If the Administrator (or the State in consultation with the Administrator, in any case in which the State has a pretreatment program approved by the Administrator) -

(A) determines that the proposed extension will not cause the publicly owned treatment works to be in violation of its permit under section 1342 of this title or of section 1345 of this title or to contribute to such a violation, and

(B) concurs with the proposed extension.

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Section 402, as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. § 1342.

**§ 1342. National pollutant discharge elimination system**

**(a) Permits for discharge of pollutants**

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

**(b) State permit programs**

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

**(1) To issue permits which -**

**(A)** apply, and insure compliance with, any applicable requirements of section 1311, 1312, 1316, 1317, and 1343 of this title;

**(B)** are for fixed terms not exceeding five years; and

**(C)** can be terminated or modified for cause including, but not limited to, the following:

**(i)** violation of any condition of the permit;

**(ii)** obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

**(iii)** change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

**(D)** control the disposal of pollutants into wells;

**(2)(A)** To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

**(B)** To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

**(3)** To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

**(4)** To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

**(5)** To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to

so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment

works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

**(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator**

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if

appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

**(4) Limitations on partial permit program returns and withdrawals**

A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of -

**(A)** a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

**(B)** a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

**(d) Notification of Administrator**

**(1)** Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

**(2)** No permit shall issue **(A)** if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or **(B)** if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

**(3)** The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

**(4)** In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

**(e) Waiver of notification requirement**

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of

subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

**(f) Point source categories**

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

**(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants**

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

**(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works**

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this

title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

**(i) Federal enforcement not limited**

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

**(j) Public information**

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

**(k) Compliance with permits**

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard

imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

**(l) Limitation on permit requirement**

**(1) Agricultural return flows**

The administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

**(2) Stormwater runoff from oil, gas, and mining operations**

The Administrator shall not require a permit under this section, nor shall the Administrator directly or

indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

**(m) Additional pretreatment of conventional pollutants not required**

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve

such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

**(n) Partial permit program**

**(1) State submission**

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

**(2) Minimum coverage**

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

**(3) Approval of major category partial permit programs**

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if -

**(A)** such program represents a complete permit program and covers all of the discharges under the jurisdiction of the department or agency of the State; and

**(B)** the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

**(4) Approval of major component partial permit programs**

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if -

**(A)** the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

**(B)** the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

**(o) Anti-backsliding**

**(1) General prohibition**

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of

this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) of this title or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

## (2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to pollutant if -

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), (g), (h), (i), (k), (n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

## (3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified

to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

**(p) Municipal and industrial stormwater discharges**

**(1) General rule**

Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of stormwater.

**(2) Exceptions**

Paragraph (1) shall not apply with respect to the following stormwater discharges:

**(A)** A discharge with respect to which a permit has been issued under this section before February 4, 1987.

**(B)** A discharge associated with industrial activity.

**(C)** A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

**(D)** A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

**(E)** A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

**(3) Permit requirements**

**(A) Industrial discharges**

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

**(B) Municipal discharge**

Permits for discharges from municipal storm sewers -

**(i)** may be issued on a system- or jurisdiction-wide basis;

**(ii)** shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

**(iii)** shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

**(4) Permit application requirements****(A) Industrial and large municipal discharges**

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

**(B) Other municipal discharges**

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

**(5) Studies**

The Administrator, in consultation with the States, shall conduct a study for the purposes of -

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

**(6) Regulations**

Not later than October 1, 1992, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for

State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(As amended Feb. 4, 1987, Pub.L. 100-4, Title IV, §§ 401, 402, 403, 404(a), (d), 405, 101 Stat. 65, 66, 67, 69.)

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Section 502, as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. § 1362.

### § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States

under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source. (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D - Manufacturing" and such other classes of significant waste

producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(As amended Feb. 4, 1987, Pub.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75; Nov. 18, 1988, Pub.L. 100-688, Title III, § 3202(a), 102 Stat. 4154.)

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Section 505, as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. §1365.

### § 1365. Citizen suits

#### (a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf -

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

#### (b) Notice

No action may be commenced -

(1) under subsection (a)(1) of this section -

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

#### (c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

**(3) Protection of interests of United States**

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

**(d) Litigation costs**

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

**(e) Statutory or common law rights not restricted**

Nothing in this section shall restrict any right which any person (or class of persons) may have under any

statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

**(f) Effluent standard or limitation**

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

**(g) Citizen**

For the purposes of this section, the term "citizen" means a person or persons having an interest which is or may be adversely affected.

**(h) Civil action by State Governors**

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the

Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 314(c), Title IV, § 406(d)(2), Title V, §§ 504, 505(c), 101 Stat. 49, 73, 75, 76.)

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Section 3002 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6922.

**§ 6922. Standards applicable to generators of hazardous waste**

**(a) In general**

Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall establish requirements respecting -

- (1) recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes;
- (2) labeling practices for any containers used for the storage, transport, or disposal of such hazardous waste such as will identify accurately such waste;
- (3) use of appropriate containers for such hazardous waste;
- (4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes;
- (5) use of a manifest system and any other reasonable means necessary to assure that all

such hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, treatment, storage, or disposal facilities (other than facilities on the premises where the waste is generated) for which a permit has been issued as provided in this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S. C.A. § 1411 et seq.]; and

(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries out a permit program pursuant to this subchapter) at least once every two years, setting out -

(A) the quantities and nature of hazardous waste identified or listed under this subchapter that he has generated during the year;

(B) the disposition of all hazardous waste reported under subparagraph (A);

(C) the efforts undertaken during the year to reduce the volume and toxicity of waste generated; and

(D) the changes in volume and toxicity of waste actually achieved during the year in question in comparison with previous years, to the extent such information is available for years prior to November 8, 1984.

**(b) Waste minimization**

Effective September 1, 1985, the manifest required by subsection (a)(5) of this section shall contain a certification by the generator that -

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

(As amended Pub.L. 98-616, Title II, § 224(a), Nov. 8, 1984, 98 Stat. 3252.)

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Section 3005 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6925.

**6925. Permits for treatment, storage, or disposal of hazardous waste**

**(a) Permit requirements**

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 2605(e) of Title 15 for the incineration of polychlorinated biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subchapter.

**(b) Requirements of permit application**

Each application for a permit under this section shall contain such information as may be required under

regulations promulgated by the Administrator, including information respecting -

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste identified or listed under this subchapter, or combinations of any such hazardous waste and any other solid waste, proposed to be disposed of, treated, transported, or stored, and the time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored; and

(2) the site at which such hazardous waste or the products of treatment of such hazardous waste will be disposed of, treated, transported to, or stored.

**(c) Permit issuance**

(1) Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities. In the event permit applicants propose modification of their facilities, or in the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 6924 of this title, the permit shall specify the time allowed to complete the modifications.

(2)(A)(i) Not later than the date four years after November 8, 1984, in the case of each application under this subsection for a permit for a land disposal facility which was submitted

before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(ii) Not later than the date five years after November 8, 1984, in the case of each application for a permit under this subsection for an incinerator facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(B) Not later than the date eight years after November 8, 1984, in the case of each application for a permit under this subsection for any facility (other than a facility referred to in subparagraph (A)) which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(C) The time periods specified in this paragraph shall also apply in the case of any State which is administering an authorized hazardous waste program under section 6926 of this title. Interim status under subsection (e) of this section shall terminate for each facility referred to in subparagraph (A)(ii) or (B) on the expiration of the five-or eight-year period referred to in subparagraph (A) or (B), whichever is applicable, unless the owner or operator of the facility applies for a final determination regarding the issuance of a permit under this subsection within -

(i) two years after November 8, 1984 (in the case of a facility referred to in subparagraph (A)(ii)), or

(ii) four years after November 8, 1984 (in the case of a facility referred to in subparagraph (B)).

(3) Any permit under this section shall be for a fixed term, not to exceed 10 years in the case of any land disposal facility, storage facility, or incinerator or other treatment facility. Each permit for a land disposal facility shall be reviewed five years after date of issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of this section and section 6924 of this title. Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. Review of any application for a permit renewal shall consider improvements in the state of control and measurement technology as well as changes in applicable regulations. Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

#### (d) Permit revocation

Upon a determination by the Administrator (or by a State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) of noncompliance by a facility having a permit under this chapter with the requirements of this section or section 6924 of this title, the Administrator (or State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) shall revoke such permit.

**(e) Interim status**

**(1) Any person who -**

**(A)** owns or operates a facility required to have a permit under this section which facility -

**(i)** was in existence on November 19, 1980, or

**(ii)** is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,

**(B)** has complied with the requirements of section 6930(a) of this title, and

**(C)** has made an application for a permit under this section shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. This paragraph shall not apply to any facility which has been previously denied a permit under this section or if authority to operate the facility under this section has been previously terminated.

**(2)** In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve months after November 8, 1984, unless the owner or operator of such facility -

**(A)** applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and

**(B)** certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

**(3)** In the case of each land disposal facility which is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section and which is granted interim status under this subsection, interim status shall terminate on the date twelve months after the date on which the facility first becomes subject to such permit requirement unless the owner or operator of such facility -

**(A)** applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after the date on which the facility first becomes subject to such permit requirement; and

**(B)** certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

**(f) Coal mining wastes and reclamation permits**

Notwithstanding subsection (a) through (e) of this section, any surface coal mining and reclamation permit covering any coal mining wastes or overburden which has been issued or approved under the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. § 1201

et seq.] shall be deemed to be a permit issued pursuant to this section with respect to the treatment, storage, or disposal of such wastes or overburden. Regulations promulgated by the Administrator under this subchapter shall not be applicable to treatment, storage, or disposal of coal mining wastes and overburden which are covered by such a permit.

**(g) Research, development and demonstration permits**

(1) The Administrator may issue a research, development, and demonstration permit for any hazardous waste treatment facility which proposes to utilize an innovative and experimental hazardous waste treatment technology or process for which permit standards for such experimental activity have not been promulgated under this subchapter. Any such permit shall include such terms and conditions as will assure protection of human health and the environment. Such permits -

(A) shall provide for the construction of such facilities, as necessary, and for operation of the facility for not longer than one year (unless renewed as provided in paragraph (4)), and

(B) shall provide for the receipt and treatment by the facility of only those types and quantities of hazardous waste which the Administrator deems necessary for purposes of determining the efficacy and performance capabilities of the technology or process and the effects of such technology or process on human health and the environment, and

(C) shall include such requirements as the Administrator deems necessary to protect

human health and the environment (including, but not limited to, requirements regarding monitoring, operation, insurance or bonding, financial responsibility, closure, and remedial action), and such requirements as the Administrator deems necessary regarding testing and providing of information to the Administrator with respect to the operation of the facility.

The Administrator may apply the criteria set forth in this paragraph in establishing the conditions of each permit without separate establishment of regulations implementing such criteria.

(2) For the purpose of expediting review and issuance of permits under this subsection, the Administrator may, consistent with the protection of human health and the environment, modify or waive permit application and permit issuance requirements established in the Administrator's general permit regulations except that there may be no modification or waiver of regulations regarding financial responsibility (including insurance) or of procedures established under section 6974(b)(2) of this title regarding public participation.

(3) The Administrator may order an immediate termination of all operations at the facility at any time he determines that termination is necessary to protect human health and the environment.

(4) Any permit issued under this subsection may be renewed not more than three times. Each such renewal shall be for a period of not more than 1 year.

**(h) Waste minimization**

Effective September 1, 1985, it shall be a condition of any permit issued under this section for the treatment, storage, or disposal of hazardous waste on the premises where such waste was generated that the permittee certify, no less often than annually, that -

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

**(i) Interim status facilities receiving wastes after July 26, 1982**

The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 6924 of this title to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) of this section shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under subsection (e) of this section which receives hazardous waste after July 26, 1982.

**(j) Interim status surface impoundments**

(1) Except as provided in paragraph (2), (3), or (4), each surface impoundment in existence on November 8, 1984, and qualifying for the authorization to operate under subsection (e) of this section shall not receive, store, or treat hazardous waste after the date four years after November 8, 1984, unless such surface impoundment is in compliance with the requirements of section 6924(o)(1)(A) of this title which would apply to such impoundment if it were new.

(2) Paragraph (1) of this subsection shall not apply to any surface impoundment which (A) has at least one liner, for which there is no evidence that such liner is leaking; (B) is located more than one-quarter mile from an underground source of drinking water; and (C) is in compliance with generally applicable ground water monitoring requirements for facilities with permits under subsection (c) of this section.

(3) Paragraph (1) of this subsection shall not apply to any surface impoundment which (A) contains treated waste water during the secondary or subsequent phases of an aggressive biological treatment facility subject to a permit issued under section 1342 of Title 33 (or which holds such treated waste water after treatment and prior to discharge); (B) is in compliance with generally applicable ground water monitoring requirements for facilities with permits under subsection (c) of this section; and (C)(i) is part of a facility in compliance with section 1311(b)(2) of Title 33, or (ii) in the case of a facility for which no effluent guidelines required under section 1314(b)(2) of Title 33 are in effect and no permit under

section 1342(a)(1) of Title 33 implementing section 1311(b)(2) of Title 33 has been issued, is part of a facility in compliance with a permit under section 1342 of Title 33, which is achieving significant degradation of toxic pollutants and hazardous constituents contained in the untreated waste stream and which has identified those toxic pollutants and hazardous constituents in the untreated waste stream to the appropriate permitting authority.

(4) The Administrator (or the State, in the case of a State with an authorized program), after notice and opportunity for comment, may modify the requirements of paragraph (1) for any surface impoundment if the owner or operator demonstrates that such surface impoundment is located, designed and operated so as to assure that there will be no migration of any hazardous constituent into ground water or surface water at any future time. The Administrator or the State shall take into account locational criteria established under section 6924(o)(7) of this title.

(5) The owner or operator of any surface impoundment potentially subject to paragraph (1) who has reason to believe that on the basis of paragraph (2), (3), or (4) such surface impoundment is not required to comply with the requirements of paragraph (1), shall apply to the Administrator (or the State, in the case of a State with an authorized program) not later than twenty-four months after November 8, 1984, for a determination of the applicability of paragraph (1) (in the case of paragraph (2) or (3)) or for a modification of the requirements of paragraph (1) (in the case of paragraph (4)), with respect to such surface impoundment. Such owner or operator shall

provide, with such application, evidence pertinent to such decision, including:

(A) an application for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility, if not previously submitted;

(B) evidence as to compliance with all applicable ground water monitoring requirements and the information and analysis from such monitoring;

(C) all reasonably ascertainable evidence as to whether such surface impoundment is leaking; and

(D) in the case of applications under paragraph (2) or (3), a certification by a registered professional engineer with academic training and experience in ground water hydrology that -

(i) under paragraph (2), the liner of such surface impoundment is designed, constructed, and operated in accordance with applicable requirements, such surface impoundment is more than one-quarter mile from an underground source of drinking water and there is no evidence such liner is leaking; or

(ii) under paragraph (3), based on analysis of those toxic pollutants and hazardous constituents that are likely to be present in the untreated waste stream, such impoundment satisfies the conditions of paragraph (3).

In the case of any surface impoundment for which the owner or operator fails to apply under this paragraph

within the time provided by this paragraph or paragraph (6), such surface impoundment shall comply with paragraph (1) notwithstanding paragraph (2), (3), or (4). Within twelve months after receipt of such application and evidence and not later than thirty-six months after November 8, 1984, and after notice and opportunity to comment, the Administrator (or, if appropriate, the State) shall advise such owner or operator on the applicability of paragraph (1) to such surface impoundment or as to whether and how the requirements of paragraph (1) shall be modified and applied to such surface impoundment.

(6)(A) In any case in which a surface impoundment becomes subject to paragraph (1) after November 8, 1984, due to the promulgation of additional listings or characteristics for the identification of hazardous waste under section 6921 of this title, the period for compliance in paragraph (1) shall be four years after the date of such promulgation, the period for demonstrations under paragraph (4) and for submission of evidence under paragraph (5) shall be not later than twenty-four months after the date of such promulgation, and the period for the Administrator (or if appropriate, the State) to advise such owners or operators under paragraph (5) shall be not later than thirty-six months after the date of promulgation.

(B) If any case in which a surface impoundment is initially determined to be excluded from the requirements of paragraph (1) but due to a change in condition (including the existence of a leak) no longer satisfies the provisions of paragraph (2), (3), or (4) and therefore becomes subject to paragraph (1), the period for compliance in paragraph (1) shall be two years after the date of

discovery of such change of condition, or in the case of a surface impoundment excluded under paragraph (3) three years after such date of discovery.

(7)(A) The Administrator shall study and report to the Congress on the number, range of size, construction, likelihood of hazardous constituents migrating into ground water, and potential threat to human health and the environment of existing surface impoundments excluded by paragraph (3) from the requirements of paragraph (1). Such report shall address the need, feasibility, and estimated costs of subjecting such existing surface impoundments to the requirements of paragraph (1).

(B) In the case of any existing surface impoundment or class of surface impoundments from which the Administrator (or the State, in the case of a State with an authorized program) determines hazardous constituents are likely to migrate into ground water, the Administrator (or if appropriate, the State) is authorized to impose such requirements as may be necessary to protect human health and the environment, including the requirements of section 6924(o) of this title which would apply to such impoundments if they were new.

(C) In the case of any surface impoundment excluded by paragraph (3) from the requirements of paragraph (1) which is subsequently determined to be leaking, the Administrator (or, if appropriate, the State) shall require compliance with paragraph (1), unless the Administrator (or, if appropriate, the State) determines that such compliance is not necessary to protect human health and the environment.

(8) In the case of any surface impoundment in which the liners and leak detection system have been installed pursuant to the requirements of paragraph (1) and in good faith compliance with section 6924(o) of this title and the Administrator's regulations and guidance documents governing liners and leak detection systems, no liner or leak detection system which is different from that which was so installed pursuant to paragraph (1) shall be required for such unit by the Administrator when issuing the first permit under this section to such facility. Nothing in this paragraph shall preclude the Administrator from requiring installation of a new liner when the Administrator has reason to believe that any liner installed pursuant to the requirements of this subsection is leaking.

(9) In the case of any surface impoundment which has been excluded by paragraph (2) on the basis of a liner meeting the definition under paragraph (12)(A)(ii), at the closure of such impoundment the Administrator shall require the owner or operator of such impoundment to remove or decontaminate all waste residues, all contaminated liner material, and contaminated soil to the extent practicable. If all contaminated soil is not removed or decontaminated, the owner or operator of such impoundment shall be required to comply with appropriate post-closure requirements, including but not limited to ground water monitoring the corrective action.

(10) Any incremental cost attributable to the requirements of this subsection or section 6924(o) of this title shall not be considered by the Administrator (or the State, in the case of a State with an authorized program under section 1342 of Title 33) -

(A) in establishing effluent limitations and standards under section 1311, 1314, 1316, 1317, or 1342 of Title 33 based on effluent limitations guidelines and standards promulgated any time before twelve months after November 8, 1984; or

(B) in establishing any other effluent limitations to carry out the provisions of section 1311, 1317, or 1342 of Title 33 on or before October 1, 1986.

(11)(A) If the Administrator allows a hazardous waste which is prohibited from one or more methods of land disposal under subsection (d), (e) or (g) of section 6924 of this title (or under regulations promulgated by the Administrator under such subsections) to be placed in a surface impoundment (which is operating pursuant to interim status) for storage or treatment, such impoundments shall meet the requirements that are applicable to new surface impoundments under section 6924(o)(1) of this title, unless such impoundment meets the requirements of paragraph (2) or (4).

(B) In the case of any hazardous waste which is prohibited from one or more methods of land disposal under subsection (d), (e), or (g) of section 6924 of this title (or under regulations promulgated by the Administrator under such subsection) the placement or maintenance of such hazardous waste in a surface impoundment for treatment is prohibited as of the effective date of such prohibition unless the treatment residues which are hazardous are, at minimum, removed for subsequent management within one year of the entry of the waste into the surface impoundment.

(12)(A) For the purposes of paragraph (2)(A) of this subsection, the term "liner" means -

(i) a liner designed, constructed, installed, and operated to prevent hazardous waste from passing into the liner at any time during the active life of the facility; or

(ii) a liner designed, constructed, installed, and operated to prevent hazardous waste from migrating beyond the liner to adjacent subsurface soil, ground water, or surface water at any time during the active life of the facility.

(B) For the purposes of this subsection, the term "aggressive biological treatment facility" means a system of surface impoundments in which the initial impoundment of the secondary treatment segment of the facility utilizes intense mechanical aeration to enhance biological activity to degrade waste water pollutants and

(i) the hydraulic retention time in such initial impoundment is no longer than 5 days under normal operating conditions, on an annual average basis;

(ii) the hydraulic retention time in such initial impoundment is no longer than thirty days under normal operating conditions, on an annual average basis: *Provided*, That the sludge in such impoundment does not constitute a hazardous waste as identified by the extraction procedure toxicity characteristic in effect on November 8, 1984; or

(iii) such system utilizes activated sludge treatment in the first portion of secondary treatment.

(C) For the purposes of this subsection, the term "underground source or drinking water" has the same meaning as provided in regulations under the Safe Drinking Water Act (title XIV of the Public Health Service Act) [42 U.S.C.A. § 300f et seq.].

(13) The Administrator may modify the requirements of paragraph (1) in the case of a surface impoundment for which the owner or operator, prior to October 1, 1984, has entered into, and is in compliance with, a consent order, decree, or agreement with the Administrator or a State with an authorized program mandating corrective action with respect to such surface impoundment that provides a degree of protection of human health and the environment which is at a minimum equivalent to that provided by paragraph (1).

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Section 3006 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6926.

**§ 6926. Authorized State Hazardous waste programs**

**(a) Federal guidelines**

Not later than eighteen months after October 21, 1976, the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the development of State hazardous waste programs.

**(b) Authorization of State program**

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice

and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

**(c) Interim authorization**

(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under section 6922, 6923, 6924, and 6925 of this title, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subchapter. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subchapter, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subchapter for a period ending no later than January 31, 1986.

(2) The Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection.

(3) Pending interim or final authorization of a State program for any State which reflects the amendments made by the Hazardous and Solid Waste Amendments of 1984, the State may enter into an agreement with the Administrator under which the State may assist in the administration of the requirements and prohibitions which take effect pursuant to such Amendments.

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

**(d) Effect of State permit**

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

**(e) Withdrawal of authorization**

Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance

with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

**(f) Availability of information**

No State program may be authorized by the Administrator under this section unless -

(1) such program provides for the public availability of information obtained by the State regarding facilities and sites for the treatment, storage, and disposal of hazardous waste; and

(2) such information is available to the public in substantially the same manner, and to the same degree, as would be the case if the Administrator was carrying out the provisions of this subchapter in such State.

**(g) Amendments made by 1984 act**

(1) Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized State program on the same

date as such requirement takes effect in other States. The Administrator shall carry out such requirement directly in each and State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

(2) Any State which, before November 8, 1984, has an existing hazardous waste program which has been granted interim or final authorization under this section may submit to the Administrator evidence that such existing program contains (or has been amended to include) any requirement which is substantially equivalent to a requirement referred to in paragraph (1) and may request interim authorization to carry out that requirement under this subchapter. The Administrator shall, if the evidence submitted shows the State requirement to be substantially equivalent to the requirement referred to in paragraph (1), grant an interim authorization to the State to carry out such requirement in lieu of direct administration in the State by the Administrator of such requirement.

**(h) State programs for used oil**

In the case of used oil which is not listed or identified under this subtitle as a hazardous waste but which is regulated under section 6935 of this title, the provisions of this section regarding State programs shall apply in the same manner and to the same extent as such provisions apply to hazardous waste identified or listed under this subtitle.

(As amended Pub.L. 98-616, Title II, §§ 225, 226(a), 227, 228, 241(b)(2), Nov. 8, 1984, 98 Stat. 3254, 3255, 3260;

Pub.L. 99-499, Title II, § 205(j), Oct. 17, 1986, 100 Stat. 1703.)

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Section 3008 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928.

**§ 6928. Federal enforcement**

**(a) Compliance orders**

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into

account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

**(b) Public hearing**

Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator, shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

**(c) Violation of compliance orders**

If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than \$25,000 for each day of continued noncompliance with the order and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State).

**(d) Criminal penalties**

Any person who -

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or

pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter -

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or

filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter -

(A) in knowing violation of any material condition or requirement of a permit under this subchapter; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall, upon conviction, be subject to a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

**(e) Knowing endangerment**

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.

**(f) Special rules**

For the purposes of subsection (e) of this section -

(1) A person's state of mind is knowing with respect to -

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury -

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

*Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.*

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of -

(A) an occupation, a business, or a profession; or

(B) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(5) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(6) The term "serious bodily injury" means -

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement;

or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

### (g) Civil Penalty

Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

### (h) Interim status corrective action

(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 6925(e) of this title, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a

time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed \$25,000 for each day of noncompliance with the order.

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Section 4005 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6945.

**§ 6945. Upgrading of open dumps**

**(a) Closing or upgrading of existing open dumps**

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping. For purposes of complying with section 6943(a)(2) and 6943(a)(3) of this title, each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State which are open dumps listed in the inventory under subsection (b) of this section shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards. Each such plan shall establish, for any entity which demonstrates that it has considered other public or private alternatives for solid waste management to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, a timetable or schedule for compliance for such practice or disposal of solid waste which specifies a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with the

prohibition on open dumping of solid waste within a reasonable time (not to exceed 5 years from the date of publication of criteria under section 6907(a)(3) of this title).

**(b) Inventory**

To assist the States in complying with section 6943(a)(3) of this title, not later than one year after promulgation of regulations under section 6944 of this title, the Administrator, with the cooperation of the Bureau of the Census shall publish an inventory of all disposal facilities or sites in the United States which are open dumps within the meaning of this chapter.

**(c) Control of hazardous disposal**

(1)(A) Not later than 36 months after November 8, 1984,\* each State shall adopt and implement a permit program or other system of prior approval and conditions to assure that each solid waste management facility within such State which may receive hazardous household waste or hazardous waste due to the provision of section 6921(d) of this title for small quantity generators (otherwise not subject to the requirement for a permit under section 6925 of this title) will comply with the applicable criteria promulgated under section 6944(a) and 6907(a)(3) of this title.

(B) Not later than eighteen months after the promulgation of revised criteria under section 6944(a) of this title (as required by section 6949a(c) of this title), each State shall adopt, and implement a permit program or

other system or prior approval and conditions, to assure that each solid waste management facility within such State which may receive hazardous household waste or hazardous waste due to the provision of section 6921(d) of this title for small quantity generators (otherwise not subject to the requirement for a permit under section 6925 of this title) will comply with the criteria revised under section 6944(a) of this title.

(C) The Administrator shall determine whether each State has developed an adequate program under this paragraph. The Administrator may make such a determination in conjunction with approval, disapproval or partial approval of a State plan under section 6947 of this title.

(2)(A) In any State that the Administrator determines has not adopted an adequate program for such facilities under paragraph (1)(B) by the date provided in such paragraph, the Administrator may use the authorities available under sections 6927 and 6928 of this title to enforce the prohibition contained in subsection (a) of this section with respect to such facilities.

(B) For purposes of this paragraph, the term "requirement of this subchapter" in section 6928 of this title shall be deemed to include criteria promulgated by the Administrator under sections 6907(a)(3) and 6944(a) of this title, and the term "hazardous wastes" in section 6927 of this title shall be deemed to include solid waste at facilities that may handle hazardous household wastes or hazardous wastes from small quantity generators.

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Section 3010 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6930.

**§ 6930. Effective date**

**(a) Preliminary notification**

Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. Not later than fifteen months after November 8, 1984 -

(1) the owner or operator of any facility which produces a fuel (A) from any hazardous waste identified or listed under section 6921 of this title, (B) from such hazardous waste identified or listed under section 6921 of this title and any other material, (C) from used oil, or (D) from used oil and any other material;

(2) the owner or operator of any facility (other than a single- or two-family residence) which burns for purposes of energy recovery any fuel produced as provided in paragraph (1) or any fuel which otherwise contains used oil or any hazardous waste identified or listed under section 6921 of this title; and

(3) any person who distributes or markets any fuel which is produced as provided in paragraph (1) or any fuel which otherwise contains used oil or any hazardous waste identified or listed under section 6921 of this title

shall file with the Administrator (and with the State in the case of a State with an authorized hazardous waste program) a notification stating the location and general description of the facility, together with a description of the identified or listed hazardous waste involved and, in the case of facility referred to in paragraph (1) or (2), a description of the production or energy recovery activity carried out at the facility and such other information as the Administrator deems necessary. For purposes of the preceding sentence, the term "hazardous waste listed under section 6921 of this title" also includes any commercial chemical product which is listed under section 6921 of this title and which, in lieu of its original intended use, is (i) produced for use as (or as a component of) a fuel, (ii) distributed for use as a fuel, or (iii) burned as a fuel. Notification shall not be required under the second sentence of this subsection in the case of facilities (such as residential boilers) where the Administrator determines that such notification is not necessary in order for the Administrator to obtain sufficient information respecting current practices of facilities using hazardous waste for energy recovery. Nothing in this subsection shall be construed to affect or impair the provisions of section 6921(b)(3) of this title. Nothing in this subsection shall affect regulatory determinations under section 6935 of this title. In revising any regulation under section 6921 of

this title identifying additional characteristics of hazardous waste or listing any additional substance as hazardous waste subject to this subchapter, the Administrator may require any person referred to in the preceding provisions to file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) the notification described in the preceding provisions. Not more than one such notification shall be required to be filed with respect to the same substance. No identified or listed hazardous waste subject to this subchapter may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection.

**(b) Effective date of regulation**

The regulations under this subchapter respecting requirements applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste (including requirements respecting permits for such treatment, storage, or disposal) shall take effect on the date six months after the date of promulgation thereof (or six months after the date of revision in the case of any regulation which is revised after the date required for promulgation thereof). At the time a regulation is promulgated, the Administrator may provide for a shorter period prior to the effective date, or an immediate effective date for:

(1) a regulation with which the Administrator finds the regulated community does not need six months to come into compliance;

(2) a regulation which responds to an emergency situation; or

(3) other good cause found and published with the regulation.

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Section 7002 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972.

SUBCHAPTER VII - MISCELLANEOUS PROVISIONS

§ 6972. Citizens suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf -

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

**(b) Actions prohibited**

(1) No action may be commenced under subsection (a)(1)(A) of this section -

(A) prior to 60 days after the plaintiff has given notice of the violation to -

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to -

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment -

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606],

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a

removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment -

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

**(c) Notice**

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

**(d) Intervention**

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

**(e) Costs**

The court in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

**(f) Other rights preserved**

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

**(g) Transporters**

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the

past or present handling, storage, treatment, transportation and disposal of such waste.

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*EPA Regulations on Prior Notice of Citizen Suits under RCRA, 40 C.F.R. § 254*

#### PART 254 - PRIOR NOTICE OF CITIZEN SUITS

AUTHORITY: Sec. 7002, Pub. L. 94-580, 90 Stat. 2825 (42 U.S.C. 6972).

SOURCE: 42 FR 56114, Oct. 21, 1977, unless otherwise noted.

##### § 254.1 Purpose.

Section 7002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, authorizes suit by any person to enforce the Act. These suits may be brought where there is alleged to be a violation by any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) of any permit, standard, regulation, condition, requirement, or order which has become effective under the Act, or a failure of the Administrator to perform any act or duty under the Act, which is not discretionary with the Administrator. These actions are to be filed in accordance with the rules of the district court in which the action is instituted. The purpose of this part is to prescribe procedures governing the notice requirements of subsections (b) and (c) of section 7002 as a prerequisite to the commencement of such actions.

## § 254.2 Service of notice.

(a) Notice of intent to file suit under subsection 7002(a)(1) of the Act shall be served upon an alleged violator of any permit, standard, regulation, condition, requirement, or order which has become effective under this Act in the following manner:

(1) If the alleged violator is a private individual or corporation, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the owner or site manager of the building, plant, installation, or facility alleged to be in violation. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation in the State in which such violation is alleged to have occurred.

(2) If the alleged violator is a State or local agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of that agency. A copy of the notice shall be mailed to the chief administrator of the solid waste management agency for the State in which the violation is alleged to have occurred, the Administrator of the Environmental Protection Agency, and the Regional Administrator of the Environmental Protection

Agency for the region in which the violation is alleged to have occurred.

(3) If the alleged violator is a Federal agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of the agency. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the Attorney General of the United States, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred.

(b) Service of notice of intent to file suit under subsection 7002(a)(2) of the Act shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the Administrator, Environmental Protection Agency, Washington, D.C. 20460. A copy of the notice shall be mailed to the Attorney General of the United States.

(c) Notice given in accordance with the provisions of this part shall be considered to have been served on the date of receipt. If service was accomplished by mail, the date of receipt will be considered to be the date noted on the return receipt card.

## § 254.3 Contents of notice.

(a) *Violation of permit, standard, regulation, condition, requirement, or order.* Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement,

or order which has become effective under this Act shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

(b) *Failure to act.* Notice regarding an alleged failure of the Administrator to perform an act or duty which is not discretionary under the Act shall identify the provisions of the Act which require such act or create such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is claimed to constitute a failure to perform the act or duty, and shall state the full name, address, and telephone number of the person giving the notice.

(c) *Identification of counsel.* The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

|                        |   |           |
|------------------------|---|-----------|
| ERNEST DAGUE, SR.,     | ) |           |
| ERNEST DAGUE, JR., and | ) |           |
| BETTY DAGUE            | ) | Civil No. |
| Plaintiffs             | ) | 85-269    |
|                        | ) |           |
| v.                     | ) |           |
|                        | ) |           |
| CITY OF BURLINGTON,    | ) |           |
| Defendant              | ) |           |

COMPLAINT FOR INJUNCTIVE RELIEF,  
CIVIL PENALTIES, AND DAMAGES

NATURE OF ACTION

1. Plaintiffs bring this civil action against the City of Burlington. As owner and operator of the Burlington Municipal Disposal Grounds (the "Landfill"), the City of Burlington has stored hazardous wastes in the Landfill in violation of Federal and State laws and regulations. The hazardous wastes stored and disposed of in the Landfill have contaminated the soils beneath the Landfill and present an imminent and substantial endangerment to the public health and the environment. In violation of Federal and State laws and regulations, toxic chemicals continue to be discharged from the Landfill into the groundwater beneath and around the Landfill and into the surface waters of a wetland adjacent to the Landfill. In addition, the City of Burlington has continually failed to prevent, *inter alia*, the escape of methane gas from the Landfill and onto Plaintiffs' property.

Accordingly, Plaintiffs seek: an injunction to prevent Defendant from accepting waste of any kind and causing further damage; an order to excavate and properly dispose of all hazardous wastes and contaminated soils in the Landfill; an order to require Defendant to install and operate immediately a groundwater treatment system, approved and subject to the supervision of this Court; and order to remove toxic and other chemicals from the groundwater and surface waters in the vicinity of the Landfill; compensatory and punitive damages; civil penalties, and attorney's fees and costs, as provided by law.

#### JURISDICTION

2. This action is brought under the citizen suit provisions of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* ("RCRA"), and of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* (the "Clean Water Act"); Vermont's Groundwater Protection, 10 V.S.A. § 1410; and common law principles of nuisance, negligence, strict liability and trespass; and uncompensated taking of Plaintiffs' property in violation of the Vermont Constitution.

3. Jurisdiction is vested in this Court by RCRA, 42 U.S.C. § 6972(a); by the Clean Water Act, 33 U.S.C. § 1365(a); and by principles of pendent jurisdiction.

4. Venue is proper as Plaintiffs' claims arose in this district.

#### PARTIES

5. Plaintiffs Ernest Dague, Sr., Ernest Dague, Jr. and Betty Dague are citizens of Vermont, residents of Burlington, Vermont, and contiguous landowners to the Landfill.

6. Defendant, the City of Burlington, has owned and operated the Landfill since at least 1961.

#### FACTS

##### LOCATION AND PHYSICAL DESCRIPTION OF THE LANDFILL

7. The Landfill is located on approximately 34 acres of wetland. The Landfill is located to the north of the commercial-residential center of the City of Burlington (See Exhibit A attached hereto).

8. The Landfill site is bounded on the north by the Central Vermont Railway, to the west by the beltline highway (Route 127), and to the south and east by Manhattan Drive.

9. The Landfill is separated from Manhattan Drive, along which Plaintiffs and their neighbors reside, by a steep (approximately 50 feet) elevation drop

10. The Landfill slopes down another 50 feet or so into a wetland commonly known as the Intervale.

11. Future development in the Intervale is zoned for recreation, conservation and open space.

12. The Winooski River is located approximately 3,000 feet east of the Landfill site and Lake Champlain is located approximately 2,600 feet to the south-west.

STORAGE AND DISPOSAL OF HAZARDOUS WASTES  
IN THE LANDFILL

A. GENERATORS WHICH HAVE DISPOSED OF  
HAZARDOUS WASTES IN THE LANDFILL

13. Hazardous wastes, as identified and listed pursuant to RCRA and the regulations promulgated thereunder, have been disposed of in the Landfill.

14. According to United States Environmental Protection Agency Notification of Hazardous Waste Site forms, Vermont Agency of Environmental Conservation Hazardous Waste Notification forms, and Company Waste Profile forms, a number of generators of hazardous wastes have disposed of such wastes in the Landfill.

15. Generators of identified and listed hazardous wastes under RCRA that have disposed of such wastes in the Landfill include, but are not limited to, the following companies:

a. The General Electric Company, between 1950 and 1979, disposed in the Landfill at least 200,000 gallons containing the following chemicals: halogenated solvents, electroplating sludge, aluminum plating sludge, cadmium, chromium and lead;

b. The E. B. & A. C. Whiting Company reported in December 1980 that it was disposing in the Landfill approximately 300 pounds per month of heat-treating salt containing cadmium and lead;

c. The Edlund Company, Inc., in 1978, apparently terminated its practice of disposing in the Landfill approximately 264 pounds per year of sodium cyanide;

d. The Hagar Hardware Company, as reported in 1982, was disposing in the Landfill:

- i. approximately 85 gallons per year of a chemical consisting of petroleum distillates (kerosene), C-dichlorobenzene, and chlorinated phenols; and
- ii. approximately 16 gallons per year of a chemical consisting in part of phenal.

e. The Blodgett Company, Inc., in 1978, reported that it was disposing 13,000 gallons per year of trichloroethylene and approximately 15 gallons per week of toluene in the Landfill.

16. Upon information and belief additional hazardous waste constituents were disposed of in the Landfill between 1977 and 1982, in the form of degreasing solvents, paints, paint solvents and thinners, ink solvents, petroleum-based inks, barium chloride, zinc dust, water soluble oils, cleaning compound, and kerosene.

B. STORAGE AND DISPOSAL OF HAZARDOUS  
WASTE IN THE LANDFILL BY THE CITY OF  
BURLINGTON

17. Over a period of years up to and including 1984, the city of Burlington Water Resources Department dumped an indeterminate amount of drums containing anhydrous ferric chloride in the Landfill.

18. The CITY OF Burlington has no immediate plan of action to isolate, contain, and remove the hazardous materials in the Landfill.

ESCAPE OF METHANE GAS FROM THE LANDFILL

19. High levels of methane gas have been released from the Landfill onto the Plaintiffs' land and other contiguous landowners.

20. Methane is a colorless, odorless flammable gaseous hydrocarbon and a byproduct of organic decomposition.

21. Methane gas has seeped into the basement of Plaintiffs' house. The Defendant has installed methane monitoring equipment in the Plaintiffs' house, including a noise alarm set to go off when the gas level reaches explosive levels.

22. Over twenty monitoring wells have been installed throughout the Plaintiffs' yard. During 1985 several of the wells contained methane gas in explosive-level concentrations.

23. In the spring, 1985, the Defendant dug a mammoth hole (approximately 40' x 40' x 30') in Plaintiffs' back yard in search of a methane gas channel.

24. Although the hole was refilled, Defendant has failed to return the Plaintiffs' yard to its condition as it existed prior to the hole excavation.

LEACHATE CONTAMINATION

25. Between 11,000 to 50,000 gallons of leachate - a liquid which percolates through the Landfill mass, and contains soluble and miscible materials from the mass - are produced daily at the Landfill.

26. Groundwater reaches and saturates the lower 9 feet of trash in the Landfill.

27. Hydrologic analyses indicate that the leachate percolates downward and joins existing groundwater flowing in a northerly direction into the Intervale where flow is generally upward, discharging the leachate contaminated groundwater into the surface water of the Intervale.

28. In April of 1984, the Vermont Agency of Environmental Conservation sampled surface water in the Intervale to the north and west of the Landfill for Volatile Organic Compounds ("VOCs"). Results of analyses of the sampling indicated the presence of significant amounts of 1,1 dichloroethane, 1,2 dichloroethane, carbon tetrachloride, benzene and xylene.

29. In October of 1984, the City of Burlington sampled surface water in four locations around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of halogenated compounds.

30. In October of 1984, the City of Burlington sampled groundwater in five monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of halogenated compounds.

31. In December of 1984, the City of Burlington sampled surface water in 2 locations around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of halogenated compounds in one of the locations.

32. In December of 1984, the City of Burlington sampled groundwater in four monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of halogenated compounds, lead and tetrahydrofuran.

33. In April of 1985, the Vermont Agency of Environmental Conservation sampled groundwater in five monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of tetrahydrofuran in two of the wells.

34. In April of 1985, the City of Burlington sampled groundwater in six monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of nickel, cyanide, and bis (2-ethylhexyl) phthalate.

35. In April of 1985, the City of Burlington sampled surface water in three locations around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of nickel and cyanide in one of the locations.

36. In June of 1985, the City of Burlington sampled surface water in one location around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of cyanide and phenols.

37. In June of 1985, the City of Burlington sampled groundwater in three monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of cyanide, phenols and lead.

38. In June of 1985, the Vermont Agency of Environmental Conservation sampled groundwater in three monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of tetrahydrofuran in two of the wells.

39. In July of 1985, the City of Burlington sampled groundwater in one monitoring well around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of lead, cyanide, bis (2-ethylhexyl) phthalate, pentachlorophenol and endosulfan sulfate.

40. In August of 1985, the City of Burlington sampled groundwater in six monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of nitrates in one of the wells.

41. Dichloroethane belongs to a group of chemicals commonly referred to as aliphatic chlorinated hydrocarbons. 1,1 dichloroethane and 1,2 dichloroethane are volatile, colorless liquids. A National Cancer Institute Study of laboratory rats and mice with orally administered 1,1 dichloroethane found dose-related increases in mammary adenocarcinomas and in hemangiosarcomas and in the incidence of endometrial stromal polyps as compared to controls. Chronic exposure to 1,2 dichloroethane has been associated with liver and kidney damage. A National Cancer Institute Study found 1,2 dichloroethane to be carcinogenic in laboratory rats and mice, causing squamous - cell carcinomas of the forestomach, hemangiosarcomas, subcutaneous fibromas, mammary adenocarcinomas, endometrial tumors, and alveolar/

bronchiolar adenomas. Severe adverse effects of 1,2 dichloroethane have been observed in humans both in acute and chronic exposure situations, including blood disorders, severe liver and kidney damages and neurological disorders.

42. Benzene is designated as a toxic pollutant under the Clean Water Act, 33 U.S.C. § 1317(a)(1). Benzene is toxic to terrestrial life by ingestion, and highly toxic to aquatic organisms. Benzene has also been shown to cause severe adverse effects on the blood forming organs, resulting in hyperplastic anemia, and decreased red and white blood cell counts. Inhalation exposure of experimental animals to benzene during pregnancy has resulted in birth defects. Benzene has been shown to cause leukemia after prolonged occupational exposures. The International Agency For Research On Cancer has determined that there is sufficient evidence to indicate that benzene is carcinogenic to humans.

43. Occupational exposure to xylene has resulted in immunological disorders and menstrual problems in females. Xylene has also been associated with an increased incidence of cleft palate in offspring of rats which were exposed to orally administered xylene during pregnancy. Xylene is toxic to fish.

44. Lead is designated as a toxic pollutant under the Clean Water Act, 33 U.S.C. § 1317(a)(1). Some toxic effects associated with lead poisoning in humans include anemia, severe intestinal cramps, impaired motor and psychomotor function, paralysis, anorexia, and fatigue. Chronic exposures to lead have been reported to inhibit hemoglobin synthesis. Lead is toxic to aquatic life.

### BIOASSAYS

45. The impacts of the generation and drainage of leachate originating in the Landfill were evaluated through a series of laboratory and field investigations. A field study was conducted by O'Brien & Gere Engineers, Inc. to identify plant and animal life which could be impacted by the leachate. The laboratory investigations were geared toward evaluating the toxicity of the leachate on freshwater aquatic life.

46. Bioassays using leachate contaminated water from the Landfill demonstrate the contaminated leachate to be toxic to plants and animals in the Intervale.

### CITY OF BURLINGTON'S VIOLATIONS OF ASSURANCES OF DISCONTINUANCE

47. The City has never been certified by the State to operate a hazardous waste or solid waste facility, as required since 1980 under the State's Hazardous Waste and Solid Waste Management statutes and regulations. The City applied for certification as a solid waste facility in December, 1979, and was denied certification in March, 1980, because the State found that the Landfill was contaminating or would very likely contaminate the Intervale.

48. From March, 1980, to January 1982, the State permitted the City to operate the Landfill without certification. During 1980 and 1981, the City developed a plan for a trash-burning electric plant (a Resource Recovery Facility or "RRF") and, based on the commitment by the City to construct the RRF, the City and the State entered into an Assurance of Discontinuance in December, 1981.

(the "First Assurance") and the State issued a Disposal Facility Certification (the "RRF Certification") in January, 1982.

49. The First Assurance required the City, *inter alia*, to cease the disposal of solid waste on July 1, 1984. Only the disposal of ash from the RRF was permitted after that date.

50. The RRF Certification required the City, *inter alia*, to adhere to a specific and extensive water testing schedule and methane gas monitoring program. It is clear that the RRF Certification was drafted primarily to regulate the disposal of ash and not the disposal of solid waste in the Landfill, as well as to address the possibility of contamination of the Intervale.

51. In 1983, the Mayor of Burlington vetoed an Aldermanic Resolution to construct the RRF. The City continued to dispose of solid waste in the Landfill under the RRF Certification until September, 1984, past the July 1, 1984, closure date.

52. The City and State entered into a second Assurance of Discontinuance (the "Second Assurance") in September, 1984, to provide a "limited extended operational period" for the Landfill. Pursuant to the terms of this Second Assurance, the City would upgrade the Landfill for State certification or close it permanently by January 2, 1985.

53. In January, 1985, the City and State again entered into an Assurance of Discontinuance (the "Third Assurance") which, *inter alia*, permits the City to operate

the Landfill as a solid waste facility until at least January, 1987.

54. The City has repeatedly failed to execute its commitments to abide by the terms of all three Assurances and the RRF Certification, and continues to operate the Landfill in violation of State and Federal law (see Exhibit B attached hereto for a listing of violations of the three Assurances).

#### PLAINTIFF'S DAMAGES

55. As a direct and proximate result of Defendant's wrongful acts and omissions in permitting the escape of methane gas, windblown paper, dust and rodents from the Landfill and onto Plaintiffs' property, Plaintiffs have suffered and will continue to suffer substantial damage, including without limitation the following:

- a. Pain and suffering attributable to their physical injuries and impairment;
- b. Emotional and psychological injury attributable to the reasonable fear of inhalation of high levels of methane gas;
- c. Emotional and psychological injury attributable to the realistic threat of future physical injury, pain and suffering, and economic loss resulting from a methane gas explosion;
- d. Diminution of real property values;
- e. Property damage arising from Defendant's excavation of their property and illegal operation by Defendant of its Landfill; and

f. A substantial, continuing reduction in the quality of life available to Plaintiffs in their chosen place of residence.

#### VIOLATIONS OF LAW

#### COUNT I – VIOLATIONS OF RCRA 42 U.S.C. §§ 6925 AND 6930

56. Plaintiffs incorporate by reference paragraphs 2 through 55 of this Complaint.

57. This count is brought under 42 U.S.C. §§ 6972(a)(1)(A) to enforce the standards, requirements, and prohibitions set forth in 42 U.S.C. §§ 6925(a), and 6930(a), and the regulations promulgated thereunder. RCRA's regulatory scheme is prospective and is designed to prevent future harm from active disposal facilities.

58. Neither the Administrator or the United States Environmental Protection Agency nor the State of Vermont has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or of the State of Vermont to require the City of Burlington to comply with the standards, requirements, and prohibitions of RCRA.

59. The Administrator of the United States Environmental Protection Agency, the State of Vermont, and the City of Burlington have been on actual or constructive notice of Defendant's violations of RCRA, so that further notice by Plaintiffs would be meaningless.

60. In violation of 42 U.S.C. § 6930(e) and the regulations promulgated thereunder, the City of Burlington has never filed with the Administrator of the United

States Environmental Protection Agency or the State of Vermont a notification stating the hazardous wastes, as identified and listed pursuant to 42 U.S.C. § 6921 and the regulations promulgated thereunder, stored and disposed of in the Landfill.

61. In violation of 42 U.S.C. § 6930(a) and the regulations promulgated thereunder, the City of Burlington is storing and/or disposing identified and listed hazardous wastes in the Landfill.

62. The City of Burlington has never applied to either the Administrator of the United States Environmental Protection Agency or the State of Vermont for a permit to store and/or dispose of hazardous wastes in the Landfill.

63. Between 1976 and November 19, 1980, at least one generator of more than one thousand kilograms per month of hazardous waste had disposed of such waste in excess of one thousand kilograms per month in the soils of the Landfill. In violation of 42 U.S.C. § 6925(a) and the regulations promulgated thereunder, the City of Burlington has continued to store in the Landfill the hazardous waste disposed of by that generator.

64. The Landfill has never been permitted, licensed, or registered by the State of Vermont to manage municipal or industrial solid waste.

65. Small quantity generated hazardous wastes were disposed of in the Landfill after November 19, 1980.

66. In violation of 42 U.S.C. § 6925(a) and the regulations promulgated thereunder, the City of Burlington

continues to store and/or dispose of small quantity generated hazardous wastes in the soils of the Landfill.

67. The Landfill does not have interim status under 42 U.S.C. § 6925(e) and the regulations promulgated thereunder.

68. Until the City of Burlington is issued a permit to store and/or dispose of hazardous wastes in the Landfill, the City of Burlington is required under the hazardous waste regulations of RCRA to stop all waste management operations at the Landfill, and send the hazardous wastes in the Landfill to a facility whose owner or operator has interim status or to a storage facility following the Part 262 rules of 40 C.F.R.

#### COUNT II - VIOLATIONS OF RCRA, 42 U.S.C. § 6945

69. Plaintiffs incorporate by reference paragraphs 2 through 68 of this Complaint.

70. This count is brought under 42 U.S.C. § 6972(a)(1)(A) to enforce the prohibition of open dumping as set forth in 42 U.S.C. § 6945.

71. Neither the Administrator of the United States Environmental Protection Agency nor the State of Vermont has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or the State of Vermont to require the City of Burlington to stop all waste management operations at the Landfill.

72. The Administrator of the United States Environmental Protection Agency, the State of Vermont, and the City of Burlington have been on actual or constructive

notice of Defendant's violations of RCRA, so that further notice by Plaintiffs would be meaningless.

73. The City of Burlington has stored and/or disposed of solid and hazardous wastes in the Landfill since 1961.

74. The Landfill has never received a permit from either the Administrator of the United States Environmental Protection Agency or the State of Vermont to operate as a hazardous waste facility or as a sanitary Landfill.

75. The City of Burlington has been operating the Landfill as an open dump according to 42 U.S.C. § 6945 and the regulations promulgated thereunder.

76. Under the requirements of 42 U.S.C. § 6945, City of Burlington was required to cease its waste management practice or disposal of hazardous waste by October 15, 1979 and to cease its waste management practice or disposal of solid waste by October 15, 1984.

77. The City of Burlington continues to operate the Landfill in blatant violation of 42 U.S.C. § 6945 and the regulations promulgated thereunder.

#### COUNT III - VIOLATION OF RCRA, 42 U.S.C. § 6972(a)(1)(B)

78. Plaintiffs incorporate by reference paragraphs 2 through 77 of this Complaint.

79. This count is brought under 42 U.S.C. § 6972(a)(1)(B) to abate the substantial and imminent

endangerment to the public health and the environment arising from the hazardous wastes in the Landfill.

80. Neither the Administrator of the United States Environmental Protection Agency nor the State of Vermont has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or of the State of Vermont to require the City of Burlington to cease all waste management practices at the Landfill and to abate the substantial and imminent endangerment to the public health and the environment arising from the hazardous wastes in the landfill.

81. The Administrator of the United States Environmental Protection Agency, the State of Vermont, and the City of Burlington have been on actual or constructive notice of Defendant's violations of RCRA, so that further notice by Plaintiffs would be meaningless.

82. The storage and disposal of hazardous wastes in the Landfill in violation of Subchapter III (Hazardous Waste Management) and of Subchapter IV (Solid Waste Management) of RCRA present an imminent and substantial endangerment to the public health and to the environment in and around the Landfill.

#### COUNT IV - VIOLATIONS OF CLEAN WATER ACT

83. Plaintiffs incorporate by reference paragraphs 2 through 82 of this Complaint.

84. This count is brought under 33 U.S.C. §1365(a)(1)(A) against the City of Burlington for discharging toxic and other pollutants into a navigable waterway

without first obtaining a permit under 33 U.S.C. §§ 1311, 1317, and 1342.

85. Neither the Administrator of the United States Environmental Protection Agency nor the State of Vermont has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or of the State of Vermont to require the City of Burlington to comply with the standards and limitations of the Clean Water Act.

86. The Administrator of the United States Environmental Protection Agency, the State of Vermont, and the City of Burlington have been on actual or constructive notice of Defendant's violations of the Clean Water Act, so that further notice by Plaintiffs would be meaningless.

87. The Landfill itself and a 48 inch stone arch culvert located in the northwest corner of the Landfill area are point sources of discharge within the meaning of 33 U.S.C. § 1362(14).

88. In violation of 33 U.S.C. §§ 1311, 1317, and 1342, the City of Burlington has discharged and continues to discharge toxic and other pollutants through the Landfill and the 48 inch stone arch culvert into the surface waters of a navigable waterway, the Intervale.

#### COUNT V - GROUNDWATER PROTECTION

89. Plaintiffs incorporate by reference paragraphs 2 through 88 of this Complaint.

90. This count is brought under the Vermont Groundwater Protection Law. 10 V.S.A. § 1410(c) (Supp. 1985) for equitable relief for the unreasonable harm

caused by the City of Burlington in altering the character or quality of the groundwater beneath and around the Landfill.

91. In 16 V.S.A. § 1410(a)(4), the General Assembly of Vermont declares that "all persons have a right to the beneficial use and enjoyment of groundwater free from the unreasonable interference by other persons."

92. In operating the Landfill the City of Burlington negligently, intentionally and recklessly caused unreasonable harm to the groundwater beneath and around the Landfill.

#### COUNT VI - COMMON LAW NUISANCE

93. Plaintiffs incorporate by reference paragraph 2 through 92 of this complaint.

94. This count is brought under principles of Vermont common law to abate the public and private nuisance caused by the Landfill and to recover compensatory and punitive damages arising from Defendant's negligent and reckless operation of the Landfill.

95. The storage and disposal of hazardous and toxic materials into the soils of the Landfill, into the surface water of the Intervale, and into the groundwater beneath and around the Landfill constitute public and private nuisances which injure and continue to threaten the natural resources in and around the Landfill and the health, safety and welfare of the people residing adjacent to the Landfill.

96. The continuing and present escape of methane gas, windblown paper, dust and rodents from the Landfill

and onto Plaintiffs' property has substantially and unreasonably interfered with Plaintiffs' use and enjoyment of their property. Plaintiffs have suffered special inconvenience, annoyance, damage and injury not endured by the general public, for which injury and damage they are entitled to recover compensatory and punitive damages.

#### COUNT VII - COMMON LAW NEGLIGENCE

97. Plaintiffs incorporate by reference paragraphs 2 through 96 of this Complaint.

98. This count is brought under principles of Vermont common law to recover compensatory and punitive damages arising from Defendant's negligent and reckless operation of the Landfill.

99. The Defendant owed a duty of care to Plaintiffs as persons who foreseeably would be injured by the City's acts and omissions in operating the Landfill. The duty of care was created by the common law of negligence as well as the Resource Conservation and Recovery Act of 1976, the Federal Clean Water Act and Vermont's Groundwater Protection law.

100. The Defendant has intentionally, recklessly and negligently breached its duty of care to Plaintiffs in the following material respects:

- (a) In its continuing failure to prevent the escape of methane gas from the Landfill and onto Plaintiffs' property;
- (b) In its continuing failure to prevent the escape of airborne emission of particulates,

rodents, and windblown paper from the Landfill and onto Plaintiffs' property.

101. In addition to the negligent acts and omissions specified in paragraph 100, Defendant has intentionally, recklessly and negligently violated the following federal and state statutes:

- (a) The Resource Conservation and Recovery Act of 1976;
- (b) The Clean Water Act;
- (c) Vermont's Groundwater Protection Law, 10 V.S.A. § 1410 *et seq.*;
- (d) Vermont's Water Pollution Control Law, 10 V.S.A. § 1251 *et seq.*; and
- (e) Vermont's Waste Management Law, 10 V.S.A. § 6601 *et seq.*

102. As a direct and proximate result of the City's intentional, reckless and negligent acts and omissions, Plaintiffs have been injured and are entitled to compensatory and punitive damages.

#### COUNT VIII - STRICT LIABILITY

103. Plaintiffs incorporate by reference paragraphs 2 through 102 of this Complaint.

104. This count is brought under Vermont's law of strict liability to recover compensatory and punitive damages arising from Defendant's operation of the Landfill.

105. Defendant has continually failed to prevent the escape of methane gas from the Landfill and onto Plaintiffs' property. Defendant's conduct constitutes an ultra-hazardous or abnormally dangerous activity for which Defendant is strictly or absolutely liable for all damages resulting therefrom.

#### COUNT IX - COMMON LAW TRESPASS

106. Plaintiffs incorporate by reference paragraphs 2 through 105 of this Complaint.

107. This count is brought under principles of Vermont common law to recover compensatory and punitive damages arising from Defendant's operation of the Landfill.

108. The escape of methane gas, windblown paper and dust from the Landfill onto Plaintiffs' property constitutes an interference with Plaintiffs' right to exclusive possession of their property.

109. Defendants knowingly and willfully permitted the escape of methane gas, windblown paper and dust from the Landfill and onto Plaintiffs' property in such a manner that, in due course, was substantially certain to, and did in fact, invade and cause injury and damages to Plaintiffs' person and property.

#### COUNT X - UNCOMPENSATED TAKING

110. Plaintiffs incorporate by reference paragraphs 2 through 109 of this Complaint.

111. This count is brought under chapter 1, Article 2nd of the Vermont Constitution to recover just compensation for the Defendant's partial taking of Plaintiffs' property.

112. The health hazards and environmental damage created by the Defendant's operation of the Landfill have substantially diminished the value and use of Plaintiffs' property and, as such, constitute a partial taking of Plaintiffs' property, for which Plaintiffs are entitled just compensation under Chapter 1, Article 2nd, of the Vermont Constitution.

#### RELIEF

WHEREFORE, Plaintiffs request the Court to provide the following relief:

A. Issue a preliminary and permanent injunction which would, at a minimum, order Defendant to:

- 1) Immediately cease its acceptance of hazardous, solid or any other waste of any kind;
- 2) Cease the unlawful discharge of hazardous and toxic pollutants into the groundwater beneath and around the Landfill and into the surface waters of the Intervale;

B. Issue an Order directing Defendant to present to the Court within 30 days a plan to excavate and properly dispose of hazardous wastes in the Landfill;

C. Issue an Order directing Defendants not to alter any part of the Landfill without the prior approval of a court-appointed monitor (paid for by Defendant);

D. Issue an Order directing Defendant to present to the Court within 30 days a plan to purge the hazardous and toxic materials from the groundwater beneath and around the Landfill and form the surface waters of the Intervale;

E. Issue an Order to install and thereafter continuously operate a leachate collection drain system;

F. Issue an Order directing Defendants to present to the Court within 30 days a methane gas control and abatement plan to remove all possibility of a methane gas explosion on or near Plaintiffs' property and that of other effective property owners.

G. Issue an Order directing Defendant to report monthly to the court-appointed monitor;

H. Issue an Order directing Defendant to permit the court-appointed monitor to oversee Defendant in Defendant's implementation of corrective measures;

I. Issue an Order directing Defendant to obtain and file a bond or equivalent security with the Court;

J. Impose upon Defendant civil penalties pursuant to 42 U.S.C. § 6928(g) and 33 U.S.C. § 1319(d);

K. Award Plaintiffs all costs of litigation, including reasonable attorney and expert witness fees, pursuant to 42 U.S.C. § 6922(e) and 33 U.S.C. § 1365(d);

L. Award Plaintiffs the sum of \$500,000.00 in compensatory damages, and the sum of \$500,000.00 in punitive damages;

M. Issue an Order to restore the Plaintiffs' property to its original condition prior to the methane gas exploration.

N. Issue an Order that this Court retain jurisdiction to supervise the carrying out of any order entered by the Court concerning the remedial action to be taken by Defendant; and

O. Any other relief as the Court may deem equitable, just and proper.

Burlington, Vermont.

October 1985.

DOWNS RACHLIN & MARTIN

By: \_\_\_\_\_  
 William W. Pearson  
 Attorney for Plaintiffs  
 100 Dorset Street  
 P.O. Box 190  
 Burlington, Vermont 05402  
 (802) 863-2375

UNITED STATES DISTRICT COURT  
 FOR THE  
 DISTRICT OF VERMONT

|                     |   |                  |
|---------------------|---|------------------|
| ERNEST DAGUE, SR.,  | ) |                  |
| ERNEST DAGUE, JR.,  | ) |                  |
| BETTY DAGUE, and    | ) | CIVIL NO. 85-269 |
| ROSE A. BESSETTE,   | ) |                  |
| Plaintiffs          | ) |                  |
|                     | ) |                  |
| v.                  | ) |                  |
|                     | ) |                  |
| CITY OF BURLINGTON, | ) |                  |
| Defendant           | ) |                  |

AFFIDAVIT

I, William W. Pearson, Esquire, affiant, of Charlotte, Vermont, after being duly sworn, state the following under oath:

1. On 8 October 1985 I sent by first-class mail the letter attached hereto as Attachment A to the following individuals:

- (a) Honorable Lee Thomas, Administrator  
 Environmental Protection Agency  
 401M Southwest  
 Washington, D.C. 20460 (A100)
- (b) Honorable Leonard Wilson, Secretary  
 Vermont Agency of Environmental  
 Conservation  
 State of Vermont  
 Heritage House  
 Montpelier, VT 05602; and
- (c) Honorable Bernard Sanders, Mayor  
 City of Burlington  
 City Hall Burlington, VT 05401

notifying them of my client's intent to file suit under 42 U.S.C. § 6901 *et seq.* ("RCRA") and 33 U.S.C. § 1251 *et seq.* ("the Clean Water Act").

2. On 9 October 1985 my client's suit was filed by hand delivery to the United States District Court for the District of Vermont and, on the same date, the City of Burlington was personally served by hand delivering the Complaint to the City Attorney for the City of Burlington.

3. On 9 October 1985 I sent by registered mail, return receipt requested, a notice of my client's intent to file suit (a copy of which is attached hereto as Attachment B) and a copy of the Complaint to the Office of the Administrator, U.S. Environmental Protection Agency, 401M Southwest, Washington, D.C. 20460.

4. On 9 October 1985 I sent by registered mail, return receipt requested a notice of my client's intent to file suit (a copy of which is attached hereto as Attachment C) and a copy of the Complaint to the Attorney General of the United States, Department of Justice, 10th & Constitution Street N.W., Washington, D.C. 20530.

5. On 10 October 1985 I hand delivered a copy of my client's Complaint to Mr. Jonathan Lash, Commissioner of Water Resources and Environmental Engineering for the State of Vermont in Montpelier, Vermont.

6. On 11 October 1985 I sent by registered mail, return receipt requested a letter (a copy of which is attached hereto as Attachment D) and a copy of the Complaint to the Office of the Administrator, Environmental Protection Agency, Region I, John F. Kennedy Federal Building, Boston, Massachusetts 02203.

Burlington, Vermont.

4th November 1985

/s/ William W. Pearson  
William W. Pearson, Esquire,  
affiant

STATE OF VERMONT  
COUNTY OF CHITTENDEN, SS.

On 4th November 1985, William W. Pearson, Esquire, personally appeared before me swearing to the truth of the foregoing.

/s/ Lizabeth Palmer  
Notary Public

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LAW OFFICE OF  
DOWNS RACHLIN & MARTIN  
100 DORSET STREET  
POST OFFICE BOX 190  
BURLINGTON, VERMONT 05402-0190  
TELEPHONE (802) 563-2375  
TELECOPIER (802) 562-7512  
TELEX 92-1857

October 8, 1985

Hon. Lee Thomas, Administrator  
of the Environmental Protection Agency  
401 M Street, SW  
Washington, DC 20460 (A-100)

Hon. Leonard Wilson, Secretary of the  
Vermont Agency of Environmental Conservation  
State of Vermont  
Heritage House  
Montpelier, VT 05602

Hon. Bernard Sanders, Mayor  
City of Burlington  
City Hall  
Burlington, VT 05401

Dear Gentlemen:

Pursuant to the provisions of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* ("RCRA"), and of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* ("the Clean Water Act") and on behalf of my clients, Ernest Dague, Sr., Ernest Dague, Jr., and Betty Dague, you are hereby notified that the City of Burlington has in the past and is presently

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operating its City Landfill in violation of RCRA and the Clean Water Act. In particular, the City of Burlington is in violation of 42 U.S.C. § 6925, 42 U.S.C. § 6930 and 42 U.S.C. § 6945. In addition, the City of Burlington is in violation of 33 U.S.C. § 1311, 33 U.S.C. § 1317, and 33 U.S.C. § 1342.

Sincerely yours,

/s/ William W. Pearson  
William W. Pearson

WWP/ms

cc: EPA Regional Office, District I  
Hon. Jonathan Lash  
Hon. Jeffrey Amestoy

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LAW OFFICE OF  
DOWNS RACHLIN & MARTIN  
PROFESSIONAL CORPORATION

100 DORSET STREET  
POST OFFICE BOX 190  
BURLINGTON, VERMONT 05402-0190

TELEPHONE (802) 563-2375  
TELECOPIER (802) 562-7512  
TELEX 92-1857

November 5, 1985

Hon. Lee Thomas, Administrator  
of the Environmental Protection Agency  
401 M Street, SW  
Washington, DC 20460 (A-100)

Hon. Leonard Wilson, Secretary of the  
Vermont Agency of Environmental Conservation  
State of Vermont  
Heritage House  
Montpelier, VT 05602

Hon. Bernard Sanders, Mayor  
City of Burlington  
City Hall  
Burlington, VT 05401

Re: Dague, et al. v. City of Burlington

Dear Gentlemen:

On 8 October 1985 I sent to each of you the attached letter notifying each of you of my clients' intent to file suit under 42 U.S.C. § 6972 and 33 U.S.C. § 1365. A copy of the complaint is attached.

Immediately following the filing of the attached complaint, the City of Burlington was personally served by

hand-delivering the complaint to the City Attorney for the City of Burlington. Later the same day, copies of the attached complaint were mailed, return receipt requested, to the Office of the Administrator of the Environmental Protection Agency in Washington, D.C., to the United States Attorney General in Washington, D.C. and to the Office of the Administrator of the Environmental Protection Agency, Region I, in Boston, Massachusetts.

On 10 October 1985, a copy of the attached complaint was hand-delivered to Mr. Jonathan Lash, Commissioner of Water Resources and Environmental Engineering for the State of Vermont in Montpelier, Vermont.

The purpose of this letter is to supplement the detailed notice you have already received concerning the claim being asserted by my clients against the City of Burlington for violations of both the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* and the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.*

The following specific violations are claimed by my clients: 42 U.S.C. § 6925(a), 42 U.S.C. § 6930(a), 42 U.S.C. § 6945, 33 U.S.C. § 1311(a), 33 U.S.C. § 1317, and 33 U.S.C. § 1342.

If you have any questions or wish additional information, please give me a call.

Sincerely yours,

/s/ William W. Pearson  
William W. Pearson

enc.

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ATTACHMENT A  
UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

|                    |   |              |
|--------------------|---|--------------|
| ERNEST DAGUE, SR., | ) |              |
| ERNEST DAGUE, JR., | ) |              |
| BETTY DAGUE, and   | ) | Civil Action |
| ROSE A. BESSETTE   | ) | No. 85-269   |
|                    | ) |              |
| v.                 | ) |              |
| CITY OF BURLINGTON | ) |              |

AFFIDAVIT OF STEVEN GOODKIND

I, STEVEN GOODKIND, being first duly sworn,  
hereby depose and state as follows:

1. My name is Steven Goodkind.
2. I am the City Engineer for the City of Burlington.
3. As such I have been directly involved with the operation of the City of Burlington's landfill. I have also been one of the primary technical representatives of the City of Burlington in its relations with the State of Vermont and private engineering firms.
4. In April of 1985, O'Brien & Gere Engineers were authorized to begin final design of the landfill leachate collection system and methane control system and capping.
5. In August of 1985, final plans and specs were received from O'Brien & Gere for the leachate collection and methane control systems.

6. Both systems were accepted so by the State of Vermont as being designed to provide the level of control necessary to achieve compliance with the State Court Order of March, 1985, and the Assurance of Discontinuance.

7. On September 5, 1985, contracts for the leachate collection and methane control systems were sent out to bid.

8. The City executed contracts with Ralph B. Goodrich Company, Inc., on November 11, 1985, for installation of both systems.

9. The methane gas control system began operation on December 27, 1985, utilizing temporary blowers.

10. Installation of the complete, as designed, methane control system was in place and operating prior to March 26, 1985. Final inspection by the manufacturer occurred on March 25, 1986.

11. The leachate collection system began operations on January 15, 1986. On that date, the associated pump station, the function of which was to pump collected leachate to the wastewater treatment plant. Until the pump station was completed on March 6, 1986, collected leachate was trucked to the wastewater treatment plant.

12. The complete, as designed, leachate collection system was in place and operating as of March 7, 1986.

13. I am personally familiar with the design and selection of both systems and based on that familiarity, I can say that the suit by the Dagues, et al, had nothing to do with the decision to install the systems, the design of

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the systems, or the decision on when they should be or were installed.

Dated at Burlington, Vermont this 7 day of December, 1989.

/s/ Steven Goodkind  
Steven Goodkind

Sworn and subscribed to before me this 7th day of December, 1989.

/s/ Alison Coburn  
Notary Public

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